IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

BEN EARL BROWDER,

Petitioner,

-vs-

DIRECTOR, DEPARTMENT OF CORRECTIONS,
STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Kenneth N. Flaxman
5549 North Clark Street
Chicago, Illinois 60640
(312) 728-3525

John T. Moran
407 Civic Center
Chicago, Illinois 60602

ATTORNEYS FOR PETITIONER

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TABLE OF CASES, STATUTES, AND OTHER AUTHORITY

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Petitioner Ben Earl Browder respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 28, 1976.

OPINIONS BELOW

None of the opinions in this case are reported. The opinion of the district court granting the petition for a writ of habeas corpus is reproduced infra at A3-A16; the order of the district court denying the respondent's motion to reconsider is reproduced infra at A26.

The order of the court of appeals reversing the decision of the district court is reproduced infra at A30-A36. (The order of the court of appeals is noted in the table of cases decided by unpublished opinion at 534 F.2d 330.) Rehearing was denied without opinion (A37).

Opinions in related state court proceedings are reported in abstract form only: People v. Browder, 13 Ill. App. 3d 198, 300 N.E.2d 511 (1973) (affirming conviction on direct appeal), reproduced infra at A39-A48; People v. Browder, 29 Ill.App.3d 596, 331 N.E.2d 162 (1975) (affirming denial of state post-conviction relief), reproduced infra at A49-A52.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1): The judgment of the court of appeals was entered on April 28, 1976; re-hearing was denied on June 18, 1976.

QUESTIONS PRESENTED

1. Did the court of appeals depart from the rule of United States v. Robinson, 361 U.S. 220 (1960), that the timely filing of a notice of appeal is "mandatory and jurisdictional," when it held that it "need not consider" the timeliness of a notice of appeal filed 128 days after entry of the final appealable order, apparently assuming that a motion to reconsider may be filed irrespective of the strict 10 day limits of Federal Rule of Civil Procedure 59?

2. Where the incompetency of appointed defense counsel has absolutely deprived petitioner, a state prisoner, of an opportunity to raise and have adjudicated his Fourth Amendment in the state courts either at trial, on direct appeal, or through state collateral proceedings, and federal relief to vindicate his unlawful arrest claim would not be precluded by Stone v. Powell, ___ U.S. ___ (1976):

a. May police officers, consistent with the Fourth Amendment, arrest all teen aged members of a family to deter-

b. Can there be "probable cause to arrest" absent grounds to believe that a particular suspect has committed an offense?

c. May police officers, consistent with the Fourth Amendment, enter a dwelling place without a warrant of any type in order to search for and "arrest for investigation" all teen aged males found in the home, when there is ample opportunity to have sought a warrant, where the facts known to the police are inadequate to allow an arrest on sight, and where the only possible justification for not seeking a warrant is the knowledge that one would not be issued?

3. Assuming that the Fourth Amendment does not prohibit warrantless, multiple suspect investigatory arrests, did the Court of Appeals err in resolving in the first instance disputed questions of fact, rather than remanding to the district judge who had presided at an evidentiary hearing?

4. May a United States Court of Appeals reverse a decision of a district court in an unpublished and non-citable opinion, when the case is not controlled by direct precedent, involves a substantial question pertaining to the protections of the Fourth Amendment, and where public notice of the decision might encourage Illinois to follow the lead of the American Law Institute and other states in enacting a statute to protect its citizenry from warrantless arrests for investigation?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, except upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

United States Constitution, Amendment XIV:

> . . . nor shall any state deprive any person of live, liberty, or property, without due process of law . . .

28 U.S.C. §2253, which provides in pertinent part:

> In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had. . .

Federal Rule of Civil Procedure 6(b), which provides in pertinent part:

> . . . [The court] may not extend the time for taking any action under Rule 50(b), 52(b), 59)b), (d), and (e), and 60(b), except to the extent and under the conditions stated in them.

Federal Rule of Civil Procedure 52(b), which provides in pertinent part:

> (b) Amendment. Upon motion of a party not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. . .

Federal Rule of Civil Procedure 59, which provides in pertinent part:

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues . . . (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. . .
>
> (b) Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

* * *

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(d) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Federal Rule of Appellate Procedure 4(a), which provides in pertinent part:

(a) Appeals in Civil Cases. In a civil case . . . in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from. . .

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket. . .

Circuit Rule 35 (formerly Rule 28) of the United States Court of Appeals for the Seventh Circuit, the "Plan for Publication of Opinions of the Seventh Circuit," is set forth in the appendix, infra at A53-A57.

STATEMENT OF THE CASE

This case arises from the failure of Illinois -- either at trial,[1] on direct appeal,[2] or through state collateral proceedings[3] -- to have afforded petitioner

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1/ Counsel appointed by the state trial court to represent petitioner, an indigent person, demonstrated a lack of appreciation of the fact that the unlawfulness of an arrest may require exclusion of its products. As the district court noted (A9-A10), the illegality of petitioner's arrest is apparent from the trial court record. Although exclusion of the fruits of the unlawful arrest had been sought by trial counsel, the illegality of the arrest was not asserted as a ground for exclusion. (A5-A6) Thus, the district court held that "no reasonable tactical basis is apparent to justify the failure to object" to the illegality of the arrest. (A9) This finding was not challenged on appeal by the respondent.

2/ On direct appeal from his conviction, petitioner urged the unlawful arrest issue as "clear error." The Illinois Appellate Court refused to adjudicate the Fourth Amendment issue, relying on prior decisions that trial counsel's lack of appreciation of Fourth Amendment issues is an absolute bar to appellate review. (A43) Petitioner's contention that the intermediate appellate court had misapplied the state waiver rule was rejected without opinion by the Illinois Supreme Court, No. 46103, November 29, 1973. There, the question had been framed as follows:

> 2. Is the Illinois waiver rule properly applied when it denied a defendant a fair opportunity to raise and have adjudicated on direct appeal his Fourth Amendment claims, when the factual basis for these claims is clear from the trial court record? (Petition for Leave to Appeal at 3) (filed as an exhibit to the petition for a writ of habeas corpus in the district court)

3/ After his conviction had been affirmed by the Illinois Appellate Court, petitioner again sought to raise and have adjudicated the unlawful arrest issue in the state courts, through the state post-conviction remedy, Ill. Rev. Stat., ch. 38, §122-1 et seq. Relief was denied by the trial court, a result affirmed by the Illinois Appellate Court (A51):

> . . . Petitioner having argued in his direct appeal that his arrest was illegal and that all things flowing therefrom should have been suppressed is now barred from any further reconsideration of that issue in post-conviction proceedings by the doctrine of res judicata.

Ben Earl Browder a full and fair opportunity to raise and have adjudicated his Fourth Amendment claim that his identification at a lineup and his alleged oral admission were the tainted fruits of his brazenly unlawful arrest, an arrest made during a warrantless investigatory dwelling search undertaken to seize suspects for "investigation of rape."[4/]

When this issue was presented to the district court, Browder's application for a writ of habeas corpus was granted from facts apparent on the face of the state trial record. (A10) Rather than appeal this final order, the respondent filed, long after expiration of the 10 day period of Federal Rules of Civil Procedure 52 and 59, a motion to reconsider.[5/] (A17-A19) Although the jurisdictional basis for this motion was never disclosed, the district court rejected petitioner's objections as to its lack of jurisdiction to consider the motion, stayed execution of the writ, and set the matter for an evidentiary hearing on the motion to reconsider. (A20)

Testimony offered by the respondent at the evidentiary hearing was at times unlikely, in conflict with a contemporaneous arrest report, and contrary to testimony given by the arresting officers at petitioner's trial.[6/] What emerged as undisputed, however, is that at the time of the arrest, the police did not know which of the persons arrested would be identified in the lineup; the arrests were made to determine which suspect, if any, would be identified. (A23)

The district court denied the motion to reconsider,

4/ In the evening of January 31, 1971, four Chicago police officers entered the Browder residence to arrest all of the teen-aged males present. (Trial record at 163-165) The charge was "investigation of rape." (Trial record at 54, 154, 233)

Q: And you arrested them all on the charge of rape?
A: Investigation of rape.

Q: Investigation of rape?
A: Yes, sir. (Trial record at 54)

The purpose of the arrests was to "clear up an investigation," (Trial record at 67), by exhibiting the suspects in a lineup to see which one, if any, would be identified (A23):

Q: All right: Isn't it true, sir, that the purpose behind your arrest of the teen aged Browders was to bring them down to the station house to place them in a line-up?
(An arresting officer): To see if they could be identified by the victim. To see which one would be identified.

Q: At the time you arrested both Browders you didn't know which one, if either, would be the one who would be identified?
A: That is correct, sir.

The officers claimed to have had ample opportunity to have sought a warrant: "When I went to the Browder residence I knew the gentlemen would be waiting for me." (Trial record at 170) Nonetheless, the search and seizure was made without either an arrest or a search warrant. (Trial record at 192)

5/ The final order granting the petition was entered on October 21, 1975; the motion to reconsider was filed and

6/ The respondent sought to justify the arrest on the basis of information given to the arresting officers by the rape victim. The first investigating officer, Stan Thomas, testified that he had interviewed the rape victim on January 29, 1971, and was told by her that her assailant was known to her as having the last name of "Browder," and living in the 4000 block of West Monroe Street. (Transcript of evidentiary hearing at 16-19) Thomas, though, admitted that he failed to act on this information for two days (Ibid at 27), and no explanation was offered for this incredible lack of zealousness.

The principal arresting officer, Martin Conroy, testified that on January 31, 1971, he spoke with the rape victim, and was told by her essentially what she had told Thomas two days earlier. (Transcript of evidentiary hearing at 37) This contradicted the contemporaneous arrest report, adopted by Conroy as true (A23), which states that the arrests were based on information received from a "known informer." (A23)

The respondent also sought to prove that only petitioner and his brother had been arrested. (Transcript of evidentiary hearing at 43) Several police officers had uniformly testified at trial, however, that four persons were arrested in the Browder residence -- the two Browder brothers, and two other teenage males who happened to be present.

finding that "the writ of habeas corpus was properly issued on October 21, 1975." (A26) Notice of appeal was filed the next day (A27); specified as the orders under review were the order denying the motion to reconsider, and the order of October 21, 1975, granting the habeas corpus petition. (A27)

Browder was released from custody after a stay had been denied by a panel of the Seventh Circuit. (A28-A29) A different panel subsequently reversed the decision of the district court, holding that the multiple suspect investigatory arrest was lawful (A36), and stating that it need not "consider whether there was a timely notice of appeal." (A34 n. 2) Re-hearing was denied without opinion. (A37) 7/

In silent testament of the fact that no court or commentator has suggested that the Fourth Amendment allows a warrantless arrest of several suspects to determine which one should be charged, the Seventh Circuit has chosen to invoke its rule relating to the disposition of appeals in unpublished orders, and thereby to withhold its opinion in this case from public scrutiny: Petitioner's motion that the decision in this case be re-issued as a published opinion was denied without explanation on July 9, 1976. (A38)

7/ The district court subsequently quashed the writ, and petitioner surrendered to the custody of the respondent. (Petitioner's application for a stay, made while his petition for re-hearing was pending in the court of appeals, was denied by Mr. Justice Stevens on May 8, 1976, No. A980.)

ARGUMENT

I. IF THE COURT OF APPEALS MAY IGNORE THE "MANDATORY AND JURISDICTIONAL" REQUIREMENT THAT A NOTICE OF APPEAL BE TIMELY FILED, THEN IT MAY DISPENSE WITH ANY LIMITATIONS ON ITS JURISDICTION TO PRODUCE A DESIRED RESULT

In order to send petitioner Ben Browder back to prison, it was necessary for the Seventh Circuit to ignore the rule that the timely filing of a notice of appeal is "mandatory and jurisdictional." United States v. Robinson, 361 U.S. 220, 228 (1960). If this departure from the accepted and ordinary rules of appellate jurisdiction is allowed to stand, more will be lost than the liberty to which Browder is entitled: If the court of appeals may ignore the "mandatory and jurisdictional" requirement that a notice of appeal be timely filed, then the court of appeals may dispense with any limitations on its jurisdiction to produce a desired result. This, however, "is not the judicial process as we know it in our law." Cardozo, The Nature of the Judicial Process, 135 (1921). The departure of the Seventh Circuit from the accepted and ordinary rules of appellate jurisdiction therefore requires correction by this Court.

1. An appeal in a habeas corpus proceeding lies from from the final order, 28 U.S.C. §2253. 8/ The final order in this case was entered on October 21, 1975, when the district court granted petitioner's application for a writ of habeas corpus, and directed that the writ be executed if petitioner had not been re-tried within 60 days. 9/ The

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8/ Compare 28 U.S.C. §2253 (appeal lies from "final order) with 28 U.S.C. §1291 (appeal lies from "final decision"). Cf. United States v. Indrelunas, 411 U.S. 216 (1973).

9/ The conditional nature of the order of October 21, 1975 did not detract from its finality. E.g., Williams v. Overholser, 104 U.S.App.D.C. 18, 259 F.2d 175 (1958); Edwards

notice of appeal from this order was filed on January 27, 1976 (A27), hopelessly beyond the 30 day "mandatory and jurisdictional" limit of Federal Rule of Appellate Procedure 4(a). Thus, the court of appeals lacked the power to reverse the final order granting the petition: "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case." Ex Parte McCardle, 74 U.S. (7 Wall) 506, 514 (1868).

2. The notice of appeal (A27) also specified as under review an order entered on January 26, 1976. That order (A26) denied a motion to reconsider, and directed that the writ be executed without further opportunity to the state to re-try petitioner. From a cryptic footnote[10/] it appears that the court of appeals assumed that its jurisdiction arose from this order. Such an assumption, however, is contrary to prior decisions of this court, as reflected in uniform decisions among the circuits.

a. The motion to reconsider (A17-A19) was not filed within the 10 day limits of Federal Rule of Civil Procedure 52 or 59, and therefore did not toll the time to appeal. See Federal Rule of Appellate Procedure 4(a); United States v. Robinson, 361 U.S. 220, 229 n. 13 (1960).[11/]

b. At best, the motion to reconsider was a motion under Federal Rule of Civil Procedure 60(b) -- a jurisdictional theory expressly disavowed by the respondent in the court below.[12/] Nor did the court of appeals treat the case as an appeal from the denial of a Rule 60(b) motion, where review is limited to determining if the district court abused its discretion in refusing to upset the finality of its earlier decision. E.g., Polites v. United States, 364 U.S. 426, 436 (1960).[13/]

c. The order of January 26, 1976 directing that the writ be executed did not provide a fresh opportunity to appeal from the earlier order which had granted the petition: "That order does no more than direct execution of the prior final judgment. Given the finality of the former, the latter order putting its alternative proviso into operation cannot be error." Edwards v. State of Louisiana, 496 F.2d 904, 906 (5th Cir. 1974); Grasso v. Norton, 520 F.2d 27, 38 (2d Cir. 1975). Just as the district court could not

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10/ A34 n. 2:

> Respondent contends that even if there was no probable cause for the arrest, the confession would be admissible under Brown v. Illinois, 422 U.S. 590 (1975). In light of our decision in the instant case the court need not consider that issue nor need it consider whether there was an untimely appeal as to this issue. (emphasis supplied)

Apparently, the court of appeals held that the notice of appeal was timely to bring up for review the legality of the arrest, the issue upon which reconsideration had been sought. (A18) Thus, it appears that the court of appeals concluded that the appeal from the denial of the motion to reconsider brought up for review the merits of the determination that the arrest was unlawful.

11/ See also Silk v. Sandoval, 435 F.2d 1266 (1st Cir. 1970); Stirling v. Chemical Bank, 511 F.2d 1030 (2d Cir. 1975); Rothman v. United States, 508 F.2d 648 (3d Cir. 1975); Burnside v. Eastern Airlines, 519 F.2d 1127 (5th Cir. 1975); Sadowski v. Bombardier, Ltd., 527 F.2d 1132 (7th Cir. 1975); Cline v. Hoogland, 518 F.2d 776 (8th Cir. 1975).

12/ In the court of appeals, respondent asserted that the motion to reconsider "was not filed under Rule 60," noting that "it is doubtful whether Rule 60 even applied in habeas cases." Reply Brief of Respondent-Appellant at 3 n. 1.

13/ See also Demers v. Brown, 343 F.2d 427 (1st Cir. 1965); Rothman v. United States, 508 F.2d 648 (3d Cir. 1975); Burnside v. Eastern Airlines, 509 F.2d 1127 (5th Cir. 1975); Brennan v. Midwestern United Life Insurance Co., 450 F.2d 778 (7th Cir. 1971); Cline v. Hoogland, 518 F.2d 776 (8th Cir. 1975); Hodgson v. United Mine Wrokers, 473 F.2d 113 (D.C. Cir. 1972).

maintain "continuing supervision over a retrial conducted pursuant to a conditional writ granted by the habeas court," Pitchess v. Davis, 421 U.S. 482, 490 (1975), the district court had no power to alter the finality of its order granting a conditional writ after expiration of the 10 day period for serving a Federal Rule of Civil Procedure 59 motion.

As set out above, there is no basis to support the jurisdiction of the court of appeals to reverse the final order entered 128 days prior to the filing of a notice of appeal. Certiorari should therefore be granted to correct this radical departure of the court of appeals from the accepted and ordinary rules of appellate jurisdiction.

II. WARRANTLESS ARRESTS FOR INVESTIGATION, A POLICE PRACTICE REPEATEDLY CONDEMNED BY THIS COURT, ARE LEGITIMIZED AND ENCOURAGED BY THE DECISION IN THIS CASE

In the evening of January 31, 1971, police officers searched petitioner's dwelling to arrest for "investigation of rape" (A10) all teen aged males who happened to be present; the admitted purpose of the multiple suspect arrests was "to see which one would be identified." (A23) The basis for this invasion upon the sanctity of the home and the dragnet arrests was "information" that one of the persons arrested had committed a rape two days before.[14/]

14/ The arrest report (A24), prepared at the time of the arrest, states that four suspects were arrested on the basis of "information from a known informer." Five years later, at the evidentiary hearing in the district court, the principal arresting officer stated that only two persons had been arrested, and that the arrests were based on information received from the rape victim. (A21)

The warrantless search and seizure was made without exigent circumstances,[15/] and was upheld by the Seventh Circuit.

The decision in this case resurrects the unbridled authority of the general warrant, and "place[s] the liberty of every man in the hands of every petty officer,"[16/] in conflict with prior decisions of this Court. If allowed to stand, the decision in this case encourages gross violations of Fourth Amendment rights, and requires review by this Court.[17/]

15/ The arresting officers claimed to have telephoned ahead, and knew "that the gentlemen would be waiting for me." (Trial transcript at 170)

16/ Stanford v. Texas, 379 U.S. 476, 481 (1965), quoting from Boyd v. United States, 116 U.S. 616, 625 (1886).

17/ Federal relief on the Fourth Amendment issue is not precluded by Stone v. Powell, ___ U.S. ___ (July 6, 1976). The record in this case demonstrates that because of the negligence or inadvertence of appointed defense counsel, petitioner was "denied an opportunity for a full and fair litigation of that claim at trial and on direct review." ___ U.S. at ___ n. 37.

Although appointed defense counsel sought to exclude from use at trial the fruits of the unlawful arrest, he never identified the unlawfulness of the arrest as a ground for suppression. Nor did appointed defense counsel seek to gain sympathy from the jury from the police misconduct -- final argument was waived. (Trial record at 278)

The absence of any tactical basis for the default of trial counsel was recognized by the district court. (A6-A8) This default deprived petitioner of an opportunity to raise the Fourth Amendment issue on direct appeal, or through the state collateral remedy. See ante at 6 n. 2, 3.

Under these circumstances, there has been a "failure of process . . . because the totality of the state procedures did not furnish the prisoner with a fair chance to litigate his case." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 455 (1963). Because this "failure of process" cannot be fairly attributed to petitioner, federal relief on the Fourth Amendment issue is not precluded by Stone v. Powell, supra.

A. THE IMPORTANCE OF THE ISSUE

This case involves one of the most important judgments made thousands of time daily in the nation's criminal justice systems: Whether there are reasonable grounds to make a warrantless arrest.

When Ben Browder, his brother, and two other "suspects" were arrested for "investigation of rape," the police did not know which suspect, if any, would be charged with the offense committed two days before. (A23) The district judge applied the ordinary meaning of probable cause to arrest, i.e., that there be reasonable grounds to believe that the arrestee had committed a crime, and held that Ben Browder had been unlawfully arrested. (A10) The Seventh Circuit did away with "offender probable cause,"[18] and held that several persons may be lawfully arrested whenever the police suspect that the offender sought will be caught up in such a dragnet.[19]

18/ "Offender probable cause refers to the probability that a particular individual has committed an offense. It is necessary for arrest but not, for instance, for issuance of a search warrant. See, e.g., People v. Daugherty, 324 Ill. 160, 154 N.E. 907 (1927); People v. Simmons, 330 Ill. 494, 161 N.E. 716 (1928)." Haddad, Criminal Procedure and Habeas Corpus, 52 Chi. K. L. Rev. 294, 299 n. 32 (1975).

19/ Contrary to the accepted and ordinary rules of appellate procedure, the court of appeals resolved in the first instance the disputed facts relating to the precise information known to the police at the time of arrest: What the court below described as "slight differences in the testimony of Officer Conroy at the evidentiary hearing from the arrest report and the trial," (A36) were rejected as inconsequential, and the court of appeals held that "the police had probable cause to believe that the assailant was either Ben Earl Browder or his brother Tyrone Browder, between whom a physical resemblance was noted." (Ibid) This "physical resemblance," though, overlooked the fact that at the time of his arrest, only petitioner had his arm in a cast, while the rape victim had failed to include this characteristic in her description of her assailant. The district court could well have resolved these "slight differences" in testimony in favor of petitioner, and concluded that the police did not have probable cause to believe that the assailant sought

If allowed to stand, the decision in this case leaves the Fourth Amendment as "little more than rhetoric."[20] By holding that arrests for investigation were based on "probable cause," and therefore lawful, the Seventh Circuit has simultaneously eliminated the deterrent of exclusion while rendering police officers immune for damages for investigative arrests under the "good faith" defense of Pierson v. Ray, 368 U.S. 547 (1967). This result signals the continuation of unbridled arrests for investigation, and presages "wholesale intrusions upon the personal security of our citizenry," Davis v. Mississippi, 394 U.S. 721, 726 (1969). The importance of this issue requires review by this Court.

B. CONFLICT WITH PRIOR DECISIONS OF THIS COURT

The investigatory arrests approved in this case were made to round up suspects to see if one of them would be identified in a line-up. While this Court has suggested

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19/ (cont)

These "slight differences in the testimony of Officer Conroy" were for resolution by the district court: "Appellate courts must constantly have in mind that their function is not to decide factual issues de novo." Zenith Radio Corp. v. Hazeltine Research Corp., 395 U.S. 100, 123 (1969). ". . .factfinding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court," DeMarco v. United States, 415 U.S. 449, 450 n. (1974). This is especially true in habeas corpus cases, where Congress has mandated that factual questions be resolved by a judge who has himself heard the testimony. Holiday v. Johnson, 313 U.S. 342 (1941); Wingo v. Wedding, 418 U.S. 461 (1974).

20/ Bivens v. Six Unidentified Agents, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting opinion)

that investigative detentions may be permissible in "narrowly circumscribed circumstances," Davis v. Mississippi, 394 U.S. 721, 728 (1969), the Court has repeatedly rejected invitations to approve warrantless arrests for investigation, as approved by the Seventh Circuit in this case.

The "practical compromise"[21/] that warrantless arrests are permissible requires that such arrests be based on reasonable grounds to believe that the arrestee had committed a crime.[22/] I.e., arrests must be based on probable cause, and may not be made to obtain probable cause.[23/]

In Wong Sun v. United States, 371 U.S. 471 (1963), a description of a suspect as "Blackie Toy," operator of a laundry "somewhere on Leavenworth Street," 371 U.S. at 481, was held insufficient to justify the arrest of a particular Toy: "Such information is no better than the wholesale or 'dragnet' search warrant." 371 U.S. at 481 n. 9. But under the reasoning of the Seventh Circuit in this case, the information available in Wong Sun would have justified an arrest of all laundry operators named Toy: In this case, the police at best knew that the offender sought was named Browder who lived in the 4000 block of West Monroe Street in Chicago; this information was held sufficient to justify the wholesale arrest of two teen aged male persons named Browder and two other teenagers, who happened to be be found by the police in the Browder residence in the 4000 block of West Monroe Street.

The wholesale arrests of the two Browders and the two other persons who happened merely to be present highlights the flaw in the expansive re-definition of "probable cause to arrest" adopted by the Seventh Circuit; certiorari should be granted to review the contraction of the Fourth Amendment apparent in this case.

C. A SUBSTANTIAL UNRESOLVED CONSTITUTIONAL QUESTION

The greatest vice of the investigatory arrests encouraged by the decision in this case is the unfettered discretion vested in the police to enter dwellings to make arrests "to clear up an investigation." If allowed to stand, this rule reads the warrant clause out of the Fourth Amendment, and "would obliterate one of the most fundamental distinctions between our form of government, where officers act under the law, and the police state, where they are the law." Johnson v. United States, 333 U.S. 10, 17 (1948).

The police had ample opportunity to seek a warrant prior to embarking on their expedition to the Browder residence. The offense under investigation had been reported on Janaury 29, 1971; two days had elapsed before the police began to act on the information purportedly obtained immediately after the offense.[24/] Warrants, however, were neither sought nor obtained.

21/ Gerstein v. Pugh, 420 U.S. 103, 113 (1975).

22/ E.g., Carroll v. United States, 267 U.S. 132, 161 (1925); Brinegar v. United States, 338 U.S. 160, 175-176 (1949); Beck v. Ohio, 379 U.S. 81, 91 (1964); Marion v. United States, 404 U.S. 307, 320 (1971); United States v. Watson, 423 U.S. 411, 431 n. 4 (Powell, J., concurring).

23/ See Mallory v. United States, 354 U.S. 449, 456 (1957); Johnson v. United States, 333 U.S. 10, 17 (1948); Henry v. United States, 361 U.S. 98 (1959); Gerstein v. Pugh, 420 U.S. 103, 120 n. 21 (1975). Cf. Brown v. Illinois, 422 U.S. 590 (1975).

24/ The arrest was made on January 31, 1971, apparently on the basis of information obtained by the police two days before, on January 29, 1971. (Transcript of evidentiary hearing at 17-19) No explanation was offered for the delay in acting on this information, if in fact it was received on January 29, 1971; apparently, the investigation stopped on January 29th and mysteriously re-commenced

1. If, instead of searching the Browder residence for a person thought to have committed an offense, the police were searching for physical evidence of that offense, it is clear that a warrant would have been required. E.g., McDonald v. United States, 335 U.S. 451 (1948).

2. Prior to embarking on their expedition to the Browder residence, the police knew "that the gentlemen would be waiting for me." (Trial record at 170) Thus, "there was no probability of a material change in the situation during the time necessary to secure [a] warrant." Taylor v. United States, 286 U.S. 1, 6 (1932). Nor can the absence of a warrant be justified by any need to prevent the destruction of evidence. See United States v. Jeffers, 342 U.S. 48 (1951); Chapman v. United States, 365 U.S. 610 (1961); Coolidge v. New Hampshire, 403 U.S. 443, 460-464 (1971).

3. The physical description available to the police was too vague to allow an arrest "on sight," as in United States v. Watson, 423 U.S. 411 (1976). The offenders sought had been described only as "two black males, one light complected and one dark complected, both wearing brown jackets and in their late teens." (Transcript of evidentiary hearing at 9) No height or weight description had been obtained. (Ibid at 12) Thus, the police could not maintain surveillance of the Browder residence, and arrest a suspect when he emerged -- essential to their mission was the entry into the dwelling place, and the search for "suspects." Compare United States v. Santana, ___ U.S. ___, ___ (1976) (Stevens, J., concurring).

4. The only warrant that the police could have obtained would have been a general warrant, authorizing the arrest of all teen aged males either named Browder or found to be in the Browder residence in the 4000 block of West Monroe Street. An application for such a general warrant would have been refused. Wong Sun v. United States, 371 U.S. 471, 481 n. 9 (1967); Whiteley v. Warden, 401 U.S. 560 (1971).

If, as the court of appeals held, petitioner was lawfully seized from his dwelling, the warrant clause of the Fourth Amendment is "dead language," United States v. United States District Court, 407 U.S. 297, 315 (1972). Certiorari should be granted to resolve this question, a question repeatedly reserved by the Court, e.g., United States v. Watson, 423 U.S. 411 (1976).

D. CONFLICT WITH DECISIONS IN OTHER JURISDICTIONS

This Court has left open the question of under what circumstances, if any, investigative detentions are permissible under the Fourth Amendment. United States v. Dionisio, 410 U.S. 1, 11 (1973). In conflict with the Court of Appeals for the District of Columbia,[25/] the Seventh Circuit has answered this question by holding that investigative detentions are permissible whenever the police wish to clear up an investigation.

A vastly different balance has been struck in other jurisdictions,[26/] as reflected in Article 170 of the American

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25/ Adams v. United States, 130 U.S.App.D.C. 203, 399 F.2d 574 (1968); United States v. Allen, 133 U.S.App.D.C. 84, 408 F.2d 1287 (1969); United States v. Greene, 139 U.S.App.D.C. 193, 429 F.2d 193 (1970)

26/ E.g. Wise v. Murphy, 275 A.2d 205 (D.C.App. 1971) (en banc); In re Fingerprinting of M.B., 125 N.J. Super 115, 309 A.2d 3 (1973); State v. Bribalva, 111 Ariz. 476, 533 P.2d 533 (1975). See also Ariz. Rev. Stat. Ann. §13-1424; Idaho Code §19-625 (1975 supp); N.C. Gen. Stat. §15A-271 et seq.

Law Institute, A Model Code of Pre-Arraignment Procedure (1975).

Article 170 of the Model Code sets out a procedure for an "order to appear for identification procedures." The salient feature of the model statute is the requirement for prior authorization by a judicial officer, based upon a detailed showing of articulated facts.[28/] This "independent, neutral, and detached judgment," North v. Russell, ___ U.S. ___, ___ (1976) is lacking in the procedure sanctioned by the Seventh Circuit.

"The Fourth Amendment imposes limits on search and seizure powers in order to prevent oppressive interferences by enforcement officials with the privacy and personal security of individuals." United States v. Martinez-Fuerte, ___ U.S. ___, ___ (1976). The decision in this case removes those limits by creating a "hunting license" for investigative arrests. Little reminder is needed that an arrest "is abrupt, is effected with force or the threat of it, and often in demeaning circumstances," United States v. Dionisio, 410 U.S. 1, 10 (1973), quoting from United States v. Doe (Schwartz), 457 F.2d 895, 898 (2d Cir. 1972). Certiorari should be granted, lest the Fourth Amendment be mere precatory language.

28/ Section 170.2(6) of the Model Code requires than an application for an order for nontestimonial identification be supported by one or more affidavits showing

(a) there is reasonable cause to believe that an offense specifically described in the application has been committed;

(b) there are reasonable grounds to suspect that the person named or described in the affidavit may have committed the offense and it is reasonable in view of the seriousness of the offense to subject him to the specific identification procedures set forth in the application;

III. CERTIORARI SHOULD BE GRANTED TO REVIEW THE BURGEONING TREND TOWARDS "SECRET LAW" IN THE UNITED STATES COURTS OF APPEALS

The decision in this case made new law in the Seventh Circuit, and is contrary to the weight of authority in other jurisdictions. See ALI, A Model Code of Pre-Arraignment Procedure (1975), 460-462. Nonetheless, the decision in this case is an "unpublished order," and may not be cited to the Seventh Circuit or to any district court in that circuit as precedent. E.g., Shear v. Richardson, 364 F.Supp. 43, 44 n.1 (S.D. Ill. 1973); United States v. Feinberg, 371 F.Supp. 1205, 1214 n. 9 (N.D. Ill. 1974). Hicks v. Miranda, 422 U.S. 332 (1975) teaches that police officers may rely on the disposition of this case, and continue to conduct warrantless, multiple suspect investigatory arrests. Such reliance would constitute "good faith," and afford the officers impunity from any action for damages. Pierson v. Ray, 368 U.S. 547, (1967). This anomalous result, which insulates from public scrutiny the novel view of the Fourth Amendment extant in the Seventh Circuit, but allows police officers to rely on this broad licence to undertake investative arrests, is the result of the Seventh Circuit's "plan for publication of opinions," set out in current Circuit Rule 35, reproduced at A53-A57.

The "plan for publication" of the Seventh Circuit, like its counterpart in the other circuits, arose from a recommendation of the Judicial Conference. See Hastings The Seventh Circuit Plan for Publication of Opinions -- A Continuing Experiment, 51 Ind. L.J. 366 (1976). Common to all of these plans is a procedure for adjudicating an appeal through an "unpublished order," which is supplied to the

parties and available to this Court in evaluating requests for further review. E.g., Rose v. Hodges, 423 U.S. 19 (1975), where this Court recognized and resolved an intra-circuit conflict through reference to "unpublished opinions." 423 U.S. at 24 n. 2 (Brennan, J., dissenting).

In all circuits other than the Tenth Circuit[29/] "unpublished opinions" may not be cited as precedent. In the Fifth and Eighth Circuits,[30/] only affirming orders may be disposed of in an "unpublished opinion." In the First, Seventh, Ninth, and Tenth Circuits,[31/] publication is required whenever the decision appealed from is reported; but if the decision appealed from is unreported, then the court of appeals, as in this case, is free to reverse in an "unpublished opinion." In the remaining circuits where an "unpublished opinion" rule has been promulgated,[32/] the court of appeals may reverse even a reported district court decision in an "unpublished opinion."[33/]

A recent addition to the "unpublished opinion" rule of the Seventh Circuit is a provision allowing "any person" to request that a decision by unpublished order be re-issued as a published opinion; petitioner made such a motion in this case, and the motion was denied without explanation. (A38)

29/ Rule 17(c) of the Tenth Circuit allows citation of unpublished opinions, and requires counsel to supply opposing counsel with a copy of the unpublished opinion.

30/ Fifth Circuit Rule 21; Eighth Circuit Rule 14.

31/ First Circuit, Appendix B to Circuit Rules; Seventh Circuit, Rule 35(c); Ninth Circuit Rule 21(f); Tenth Circuit, Rule 17(g).

32/ Neither the Third nor the Fourth Circuits have apparently promulgated a formal rule dealing with disposition of appeals in unpublished orders. In the Fourth Circuit, however, pro

This case therefore provides the Court with a needed opportunity to review the propriety of these "unpublished opinion" rules, to review the conflict between the rules of the several circuits as to whether it is permissible to reverse in an unpublished opinion, and to halt the burgeoning trend towards "secret law."

1. The effect of not publishing the opinion in this case is to withhold from public scrutiny the view of the Seventh Circuit that warrantless arrests for investigation are not prohibited by the Fourth Amendment. This result had not been reached by the Seventh Circuit in any prior case, and, as reflected in the opinion, there is no direct precedent supporting the power of the police to arrest, without warrants, several suspects to determine whom they should charge. See A34-A36. The weight of authority, in fact, is to the contrary. See ALI, A Model Code of Pre-arraignment Procedure (1975), 460-462. Exposing the minority view of the Seventh Circuit to public scrutiny may well result in the states within that circuit adopting statutes to protect their citizenry from unregulated investigative arrests; even if such arrests are not prohibited by the Fourth Amendment, the states may of course establish a higher standard, e.g., Lego v. Twomey, 404 U.S. 477, 480 (1972), but the need for a higher standard is unknown if the decision in this case is withheld from publication.

2. The problems inherent in disposition of an appeal by "unpublished order" is not limited to this case, nor to the Seventh Circuit. See, e.g., Report of the Chicago Bar Association Committee on Appellate Court Congestion and Procedure, 56 Chi. Bar. Rec. 16, 20-21 (1974); Haddad, Criminal

n. 29 (1975); Weisgall, Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion, 9 Univ. San. Fran. L. Rev. 219, 253-254 (1974); Gardner, Ninth Circuit's Unpublished Opinions: Denial of Equal Justice? 61 A.B.A.J. 1224 (1975).

3. In contrast to the summary disposition rules of the Fifth and Eighth Circuits, the rule of the Seventh Circuit allows, as in this case, a reversal absent published opinion. Mr. Justice Brennan recently observed that affirming without opinion is a procedure fraught with difficulties, Colorado Springs Amusements, Ltd v. Rizzo, ___ U.S. ___ (July 6, 1976) (Brennan, J., dissenting from denial of certiorari). These difficulties are even more pronounced when, as here, a decision is reversed without published opinion.

4. As applied in this and other cases, the effect of the "unpublished opinion" rule is to allow a court of appeals discretion to decide which appeals it will decide on their merits. Assuming that a court has jurisdiction over a case, any adjudication is an adjudication on the merits, and entitled to precedential effect. See Hicks v. Miranda, 422 U.S. 332, 344 n. 14 (1975). This is recognized by the Tenth Circuit, in its rule 17(c) which allows citation of unpublished opinions. But absent such a provisions, the "unpublished opinion" rules allow a court of appeals to decide which of its decisions will have precedential effect, and thereby vests a court of appeals with the power to determine which appeals it will decide, a power lacking in our system, Garrisson v. Patterson, 391 U.S. 464 (1968).

5. A potential evil of the "unpublished opinion" rules is that they allow the courts of appeals "to avoid making a difficult or troublesome decision or to conceal

Workers, 430 F.2d 966, 972 (5th Cir. 1970) (Brown, C.J.) This may well be the justification for withholding the opinion in this case from publication.

For these reasons, certiorari should be granted to review the propriety of "unpublished opinion" rules, to review the conflict between the rules of the several circuits as to whether it is permissible to reverse in an unpublished opinion, and to halt the burgeoning trend towards "secret law."

CONCLUSION

For the reasons above stated, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding.

Kenneth N. Flaxman
5549 North Clark Street
Chicago, Illinois 60640
(312) 728-3525

John T. Moran
407 Civic Center
Chicago, Illinois 60602

ATTORNEYS FOR PETITIONER

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5325

BEN EARL BROWDER, PETITIONER

v.

DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 7, 1976
CERTIORARI GRANTED JANUARY 25, 1977

INDEX

SUMMARY OF DOCKET ENTRIES

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, No. 75 C 69

DATE OF ENTRY	TEXT
1/8/75	File petition for writ of habeas corpus
2/11/75	File record, People of the State of Illinois v. Ben Browder, Circuit Court of Cook County, Criminal Division
3/11/75	Enter order dated March 7, 1975: Order proceedings are stayed until such time as the Illinois court rules or dismisses petitioner's application for state collateral relief.
3/17/75	Enter order dated March 14, 1975: Petitioner's motion to declare that voluntary dismissal of petitioner's pending state court appeal from a denial of state post-conviction relief will not be a conscious by-pass of an available state remedy, and will satisfy the exhaustion of state remedies requirement, denied. Case continued to April 15, 1975 for status.
6/17/75	File petitioner's motion to vacate stay
6/18/75	Enter order dated June 17, 1975: Petitioner's motion to vacate stay granted.
10/21/75	Enter order dated October 21, 1975: Order petition for Writ of Habeas Corpus granted. Respondent given sixty days to retry the petitioner or the Writ of Habeas Corpus shall be executed.
10/21/75	File memorandum opinion on order granting petition for writ of habeas corpus.
11/17/75	Enter order dated November 17, 1975: Respondent's motion for leave to withdraw the state court record is granted.
11/19/75	File respondent's motion to further stay the execution of the writ of habeas corpus and to conduct an evidentiary hearing.
12/15/75	Enter order dated December 8, 1975: Before the court is the respondent's motion for a stay of the execution of a writ of habeas cor-

DATE OF ENTRY	TEXT
	pus pending an evidentiary hearing on the determinative issue of probable cause. The respondent asserts that the state court record submitted to this court does not afford an opportunity for a complete examination of the crucial facts surrounding the arrest of the petitioner. The court notes that the argument was not raised by the respondent prior to the ruling in this cause. However, the court concludes that the request for an evidentiary hearing should not be denied solely because it is untimely. *Townsend v. Sain*, 372 U.S. 293 (1963); *United States ex rel. McNair v. New Jersey*, 492 F.2d 1307 (3d Cir. 1974); Accordingly the respondent's motion for stay of execution of writ is granted pending an evidentiary hearing on the issue of probable cause.
12/15/75	Enter order dated December 12, 1975: Evidentiary hearing in this matter set for January 5, 1976 at 10:30 a.m. Evidence and argument shall be specificaly directed to the issue of probable cause to arrest.
12/19/75	File petitioner's notice of motion with motion to vacate orders and memorandum in support of said motion, attached.
12/22/75	Enter order dated December 19, 1975: Hearing —Petition for Writ of Habeas Corpus set for January 7, 1976 at 11 a.m.
1/8/76	Enter order dated January 7, 1976: On motion of respondent order respondent's motion to dismiss and motion for evidentiary hearing to stand as a return to petition. Evidence heard and concluded. Cause taken under advisement.
1/28/76	Enter order dated January 26, 1976: Following an evidentiary hearing and further argument by the parties the court finds that the writ of habeas corpus was properly issued on October 21, 1975. The motion to reconsider is therefore DENIED. Accordingly, the writ shall issue with execution stayed for five days pending prompt filing of notice of appeal and application to the court of appeals for a further stay. The court further finds that petitioner's request for fees pursuant to 28 U.S.C. Section 1927 is not justified and is hereby DENIED.
1/27/76	File respondent-appellant's notice of appeal.

DATE OF ENTRY	TEXT
	UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, No. 76-1089
1/30/76	Enter order denying respondent-appellant's "emergency motion to stay execution of writ of habeas corpus pending appeal." Order that appeal be expedited in accordance with schedule set out.
2/27/76	Arguments heard.
4/28/76	File "unpublished order," not to be cited per Circuit Rule 28: Order granting the writ of habeas corpus is REVERSED.
5/5/76	Enter order granting motion of respondent-appellant to expedite the issuance of the mandate, and directing the Clerk of this Court to issue the mandate forthwith.
5/7/76	File petitioner's emergency motion to recall and stay mandate pending application for a stay to the circuit justice
5/10/76	Enter order denying emergency motion to recall and stay mandate.
5/11/76	File petition for re-hearing, suggestion that cause be reheard in banc, and emergency motion to recall and stay mandate.
5/26/76	Enter orders denying petitioner's emergency motion to stay and recall mandate and motion for enlargement from custody pending final disposition of appeal.
6/18/76	Enter order denying petition for rehearing.
6/28/76	File petitioner's motion that a decision by unpublished order be issued as a published opinion.
7/9/76	Enter order denying petitioner's motion that a decision by unpublished order be issued as a published opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA EX REL. BEN EARL BROWDER, *Petitioner,* —VS.— DIRECTOR, DEPARTMENT OF CORRECTIONS, STATE OF ILLINOIS, *Respondent.*	75C 69

PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner, by counsel, alleges the following:

1. Petitioner Ben Earl Browder is a state prisoner, confined in the custody of respondent, the Director of the Department of Corrections of the State of Illinois, at the Illinois State Penitentiary, Stateville Branch.

2. Petitioner's confinement is the result of a 4 to 15 year sentence imposed by the Circuit Court of Cook County from Indictment Number 71-1081 on August 27, 1971, after a jury had found petitioner guilty of the offense of rape.

3. Petitioner was represented by court appointed counsel at trial.

4. The judgement of the trial court was upheld by the Illinois Appellate Court, First District, on July 2, 1973, 13 Ill. App. 3d 198, 300 N.E. 2d 511 (1973) (abstract only) (slip opinion attached.)

5. On direct appeal, petitioner argued, *inter alia,* that the entirety of the evidence used against him at trial was the "tainted fruit" of his unlawful arrest; this claim was held to have been "waived" by the negligence of appointed trial counsel. (Slip opinion, p. 3-5.)

6. Leave to appeal was denied by the Illinois Supreme Court on November 29, 1973, case number 46103; in seeking discretionary review, petitioner argued, *inter alia,* that the appellate court had improperly applied the Illinois waiver rule. (Petition, p. 12-14, attached.)

7. Review on certiorari was not sought in the Supreme Court of the United States.

8. Petitioner, through present counsel, sought post-con-

viction relief in the Circuit Court of Cook County, PC No. 2612, urging, inter alia, the unlawful arrest claim referred to in paragraph 5 above, a claim arising from the absence of counsel at a post-arrest lineup, and a claim arising from the alleged failure of trial counsel to investigate petitioner's alibi defense. The post conviction petition was dismissed without an evidentiary hearing on December 13, 1973.

9. An appeal from the denial of post conviction relief is now pending in the Illinois Appellate Court, First District, No. 60582.

10. In the post-conviction appeal, the state has argued that all of petitioner's claims are barred by *res judicata*/waiver, and that the merits of petitioner's lineup claim have been explicitly rejected by the Illinois Supreme Court in prior cases. A copy of the state's brief is attached.

11. In the absence of an unexpected change in Illinois law, the Illinois Appellate Court will hold that petitioner's fourth amendment claim is barred by *res judicata*/waiver, and the state post-conviction remedy is an ineffective remedy for vindication of this claim.

Brief Statement of Claim

12. Petitioner's conviction rests solely upon the "tainted fruits" of his unlawful arrest.

Facts in Support of Claim

13. Petitioner, along with every adult male present in the Browder residence, was arrested on January 30, 1971, in order to "clear up an investigation." (R. 67) ["R. —" refers to pages in the transcript of proceedings at petitioner's state court trial.] This multiple suspect investigatory arrest was made without probable cause, without a warrant, and in the absence of any exigent circumstances, and was unlawful:

a. On January 31, 1971, one Martin Conroy, a police officer of the City of Chicago, received an assignment relating to the rape of one Sharon Alexander. (R. 31)

b. Upon checking his files, Conroy discovered some information relating to one Tyrone Browder, and telephoned the Browder residence. (R. 31)

c. During this telephone conversation, Conroy learned

that Tyrone Browder, along with his brother Ben Earl Browder, petitioner herein, was at home. (R. 170)

d. Thereafter, Conroy, accompanied by three other police officers, went to the Browder residence (R. 32), and there arrested all of the young, adult black males present. (R. 67).

e. At the time of making these arrests, the police officers realized that they did not have probable cause to arrest any one of the four youths, and advised the arrestees that they were being arrested for "investigation of rape." (R. 164-165).

f. The four arrestees were then transported to a police station, and placed in a lineup. (R. 33-34).

g. This lineup was first viewed by Sharon Alexander, who allegedly identified petitioner. (R. 33). Apparently this was a mis-identification, as criminal proceedings do not appear to have resulted from this "identification."

h. While petitioner was standing in this lineup, the police arranged for another rape victim to view the lineup, and one Johnnie Mae Johnson allegedly identified petitioner, (R. 34); this identification resulted in the conviction here under collateral attack.

i. After they had escaped identification, the three other persons arrested with petitioner were released. (R. 168).

j. After the lineup identification, petitioner allegedly made an inculpatory admission to Officer Conroy. (R. 52).

k. The totality of the evidence upon which petitioner's conviction is based is the testimony about the lineup identification, the alleged admissions, and a subsequent in-court identification, and this evidence is the "tainted fruit" of the underlying unlawful arrest.

WHEREFORE petitioner prays that the Court direct issuance of a writ of habeas corpus, directing that petitioner be released outright from state custody.

Respectfully submitted,
Kenneth N. Flaxman

Kenneth N. Flaxman
5549 North Clark Street
Chicago, Illinois 60640
312-728-3525
John T. Moran
407 Civic Center
Chicago, Illinois 60602
312-443-6350
Attorneys for Petitioner

IN THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT

No. 56827

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE, v. BEN E. BROWDER, DEFENDANT-APPELLANT.	Appeal from Circuit Court Cook County. Honorable Philip Romiti, Presiding.

(Opinion filed July 2, 1973)

MR. JUSTICE HALLETT delivered the opinion of the court:

After a jury trial on charges of armed robbery and rape, the defendant was found not guilty of armed robbery but guilty of rape, and was sentenced to four to fifteen years in the state penitentiary.

On his appeal the defendant contends, first, that his initial arrest without a warrant was illegal and that therefore his identification in a lineup, his alleged oral admissions following such identification and his in-court identification should have been suppressed as the poisoned fruits of that arrest and, second, that the prosecutor's comments, in his closing argument, on the failure of the defendant to produce witnesses in support of his alibi prejudiced him and deprived him of a fair trial.

Johnnie Mae Johnson testified that on January 30, 1971, at about 5:45 P.M., she was returning home from a local store when she saw a young man walking through an adjoining alley. She continued on beyond the alley and, after turning the corner, noticed the same man walking behind her. She continued walking and, when she got a door from her home, he grabbed her and forced her to go through a gangway and into a basement where he raped her. He also took her watch, some bus tokens and some change. He had a white bandage on his hand and wore a white tam and an earring in his left ear. She also observed his face and heard his voice, warning her not to call the police. She went directly home and immediately called the police. She was

taken to the County Hospital where she was examined. The intern's report showed sperm in the vaginal area.

[2] The next day the defendant and three other men were arrested, without a warrant, at his home in connection with an investigation of the rape of one Sharon Alexander and placed in a lineup. After Miss Alexander had identified the defendant and had left the room, the complaining witness here, Miss Johnson, also viewed the same lineup. She positively identified the defendant by his face and his voice. He also wore an earring in his left ear, had a bandage on his hand and had a white tam. The defendant then told Officer Conroy that he wanted to tell him something. After the officer had warned him of his right to remain silent and his right to counsel, the defendant told Conroy and Officer O'Driscoll that he had raped Johnnie Mae Johnson but denied having a gun and denied raping Sharon Alexander. He also repeated his admission before Officer Thomas, a homicide investigator.

The defendant testified, in his own behalf, that he had left his home at about 5 o'clock on the evening of the crime to go to the store, that he was back home by 5:30 P.M. and that at 5:45 P.M., he was at home with his brother, his mother, his brother's girlfriend, one of his brother's partners and one of his partners. He denied raping or robbing Johnnie Mae Johnson and denied telling any police officer that he had raped her.

During the closing argument, the Assistant State's Attorney, after stating that the defendant is presumed innocent and that the burden of proof is on the State, which must prove his guilt beyond a reasonable doubt, mentioned the defendant's failure to produce as witnesses any of those persons in whose presence he claimed to have been at the time of the crime.

The jury found the defendant guilty of rape but not guilty of armed robbery.

In the written motion for a new trial, the defendant did not claim that his oral admissions should have been excluded or that the court erred in allowing the identification testimony but did claim that the State's Attorney's closing argument was inflammatory and prejudicial. On the oral argument of the motion, the defendant also argued that the identification testimony [3] was tainted by a suggestive lineup.

The motion for a new trial was denied, the defendant was sentenced to not less than four nor more than fifteen years in the penitentiary and this appeal followed.

Going now to the defendant's first contention—that his initial arrest without a warrant (in connection with another alleged rape) was illegal and that therefore his identification in the resulting lineup, his alleged oral admissions following his said identification and his later in-court identification should all have been suppressed as the poisoned fruits of that arrest—this contention was not raised in the trial court, either during the trial or in the motion or argument for a new trial.

In *People v. Harris,* 33 Ill. 2d 389, 211 N.E. 2d 693, the defendant, in the Supreme Court, for the first time contended that evidence used against him was the result of an illegal arrest and an unlawful search and seizure. In affirming, our Supreme Court, at pages 390-391, said:

> "At the trial defendant urged a lack of proper identification of the defendant and claimed that he found the wallet on a C.T.A. bus. On this appeal, however, his sole argument is that the wallet in question was obtained by an illegal search and seizure pursuant to an illegal arrest. Despite the inadequate abstract filed, we have carefully examined the entire record and find that neither the defendant nor his counsel had at any time moved to suppress the evidence in question. We also find a complete lack of any objection to the admission of this evidence on the ground that it was illegally obtained or on any other specific ground.
>
> "Defendant's post-trial motions for a new trial and in arrest of judgment are also devoid of any reference to the impropriety of the admission of this evidence. On this appeal much of defendant's argument is devoted to the alleged illegality of his arrest. This issue becomes important only if the evidence obtained thereby is properly objected to at the trial. It is well settled that this court will not consider the question of illegal search and seizure, even though pursuant to an illegal arrest, where it has not been raised [4] before the trial court. (*People v. Sotos,* 26 Ill. 2d 460; *People v. King,* 26 Ill. 2d 586; *People v. Brengettsy,* 25 Ill. 2d 228.) Justice will not be served by permitting a defendant to proceed through an entire trial without rais-

ing alleged error and then take advantage of such error on an appeal from an adverse judgment."

In *People v. Moore,* 43 Ill. 2d 102, 251 N.E. 2d 181, the Court, at page 106, said:

"• • • In that brief the defendant contends that his arrest was illegal and argues that the seizure of his articles was illegal. The defendant was represented at his trial by counsel and the alleged irregularity of the arrest and search was not presented to the trial court. Constitutional claims may, of course, be waived and the failure to assert this claim in the trial court makes it unnecessary to consider it here."

Again, in *People v. Nilsson,* 44 Ill. 2d 244, 255 N.E. 2d 432, the Court, at pages 246-247, said:

"Defendant next contends that the circumstances attending his arrest, his confession, and his consent to the search which produced the stolen goods were such as to require suppression of the confession and the recovered property. Defendant was arrested without a warrant and claims here for the first time that there was no probable cause for the arrest. Therefore, he argues, evidence adduced thereby was inadmissible as 'fruit of the poison tree.' Since this argument was not raised in his motion to suppress or at any time prior to this appeal, we find that the issue was waived. (*People v. Moore,* 43 Ill. 2d 102, 106.)"

And, more recently, in *People v. Burroughs,* 10 Ill. App. 3rd 477, 294 N.E. 2d 325, this court, at page 478, said:

"Defendant contends that the search and seizure of three tires and rims from the trunk without a warrant was illegal and they cannot be used to support a conviction of a theft of property of the value of over $150.00. Further, that the only proper evidence would be the one tire and rim in the back seat of the car. Since the value of this property would be less than $150.00, the offense would be reduced from a felony to a misdemeanor.

"Defendant was represented by private counsel in the trial court and failed to move in that court for suppression of the three tires and rims. He urges that this question should be considered for the first time on

review in this court, by reason of Supreme Court Rule 615, as a plain error or defect affecting substantial rights of the defendant although not brought [5] to the attention of the trial court. We cannot agree. Under the facts of this case we feel bound by the rule that a reviewing court will not consider the question of illegal search and seizure where it has not been raised in the trial court. *People v. Harris,* 33 Ill. 2d 389, 211 N.E. 2d 693; *People v. Cassell,* 101 Ill. App. 2d 279, 243 N.E. 2d 363; *People v. Green,* 36 Ill. 2d 349, 223 N.E. 2d 101; *People v. Washington,* 45 Ill. 2d 477, 259 N.E. 2d 276; *People v. Moore,* 43 Ill. 2d 102, 251 N.E. 2d 181; *People v. Adams,* 41 Ill. 2d 98, 242 N.E. 2d 167."

We therefore conclude that since the propriety of his arrest (in another rape investigation) was not in any way raised in the trial court, it cannot now be raised here on appeal. We also doubt seriously that his identification in the lineup, his oral confessions after that identification and his positive in-court identification can be considered as the "fruits" of that arrest.

This brings us to the defendant's second contention—that the prosecutor's comments, in his closing argument, on the failure of the defendant to produce as witnesses any of those persons in whose presence he claimed to have been at the time of the crime prejudiced him and deprived him of a fair trial.

In his closing argument, the Assistant State's Attorney, after stating that the defendant is presumed innocent and that the burden of proof is on the State, which must prove his guilt beyond a reasonable doubt, mentioned the defendant's failure to produce as witnesses any of those persons (viz: his mother, his brother Tyrone, Tyrone's girlfriend, his brother's partner, Stanley Polk, and the defendant's partner, Milton Hale) in whose presence he claimed to have been at the time of the crime. The defendant gave these names at the end of his testimony, so that the State had no opportunity to call them as witnesses. Furthermore, the proof left no doubt whatsoever of his guilt. The victim had adequate opportunity, during the crime, to observe him and to hear his voice, she identified him positively by his [6] appearance and voice and, as she had described the rapist, he had a pierced left ear with an earring, had a bandage on his hand and wore a tam.

In such a situation, the case of *People v. Nilsson,* 44 Ill. 2d 244, 255 N.E. 2d 432, above cited, is persuasive. There our Supreme Court, at page 248, speaking through Mr. Chief Justice Underwood, said:

> "The final point raised by defendant concerns the prosecutor's reference, during closing argument, to defendant's failure to support his alibi with the testimony of the alleged alibi witnesses. The authority in Illinois is conflicting on the question whether such comment is improper. (See *People v. Rubin,* 366 Ill. 195, 198; *People v. DeLordo,* 350 Ill. 148, 161-62; *People v. Munday,* 280 Ill. 32; *People v. Smith,* 74 Ill. App. 2d 458, 463-64; but see, *People v. Swift,* 319 Ill. 359, 365-66; *People v. Smith,* 105 Ill. App. 2d 8, 11-12; *People v. Sanford,* 100 Ill. App. 2d 101, 104-05.) There can be no question, however, as to the rule that improper remarks do not constitute reversible error unless they result in substantial prejudice to the accused. (*People v. Stahl,* 26 Ill. 2d 403, 406; *People v. Swets,* 24 Ill. 2d 418, 423; *People v. Berry,* 18 Ill. 2d 453, 458.) Since we are of the opinion that the prosecutor's remarks here were so minor that they could not have been a material factor in defendant's conviction, and therefore cannot constitute reversible error, we need not consider their propriety."

We therefore conclude that the prosecutor's remarks during his closing argument did not constitute reversible error in that they did not substantially prejudice the accused or deprive him of a fair trial.

We therefore affirm the judgment of the circuit court.

JUDGMENT AFFIRMED.

Burke, P.J., concurs.
Goldberg, J., specially concurring.
(Abstract only.)

[7] Mr. JUSTICE GOLDBERG, specially concurring:

I approve of the result reached and of the reasons stated in the above opinion. It demonstrates completely and effectively that the judgment appealed from should be affirmed. However, I wish to add the following as additional reasons requiring this result.

This record shows that defendant was quite ably represented in the trial court. His appointed counsel made motions for discovery; to suppress oral statements made by defendant; to reduce bail and to suppress evidence of his identification. These factors should impel us to presume a knowing waiver of any issue regarding legality of defendant's arrest.

In this regard, I would cite *People v. Montgomery,* 51 Ill. 198, 282 N.E.2d 138. There, the Supreme Court invoked the doctrine of waiver despite the youth of the defendant. (Defendant there was 17 years of age. Defendant in the case at bar was 18 when tried.) We note particularly that the Supreme Court described the arrest without warrant in *Montgomery* as harmless error, "* * * in the absence of a search and seizure issue, and in view of adequate Miranda warnings * * *." (51 Ill. 2d at 202.) Furthermore, it has been held that where no evidence was seized at the time of defendant's arrest, any issue that may have arisen from a warrantless arrest "* * * was rendered moot when the defendant was indicted by the grand jury." *People v. Hyde,* 1 Ill. App. 3d 831, 845, 275 N.E. 2d 239.

As regards defendant's second point regarding improper final argument by the prosecutor, the background is shown in the above opinion. The record here shows, in addition, that defendant's testimony on direct examination consisted of no more [8] than nine answers to that number of questions put by his counsel. He did little more than deny categorically that he had raped and robbed the complaining witness and that he had admitted the rape to the police officers. Under these circumstances, the State was obliged to cross-examine defendant. Without such procedure the defendant would have had a completely unfair privilege and advantage. Throughout the entire cross-examination, which sought to ascertain where defendant was at the time of the commission of the crime and with whom, no objection was made by his diligent trial counsel. This cross-examination of defendant was entirely proper. (See *People v. Burris,* 49 Ill. 2d 98, 104, 273 N.E. 2d 605.) Therefore, it is clear that the jury knew very well, without comment by the prosecutor, the defendant's position was totally uncorroborated.

In a situation of this type, the comments by the prosecutor in final argument are patently lacking in significance. Furthermore, the evidence of guilt here is beyond reasonable

doubt and virtually overwhelming. There is a strong and positive identification of defendant; a clear-cut oral admission of guilt by him, corroborated by three police officers, made after complete Miranda warnings; and, finally, medical evidence substantiating the testimony of the complaining witness. The only scintilla of evidence to the contrary is defendant's own categorical denial. In this situation, the allegedly improper remarks by the State's Attorney were, "• • • of such a minor character that prejudice to defendant is not their probable result • • • ." *People v. Clark,* 52 Ill. 2d 374, 390, 288 N.E. 2d 363.

In addition, it may be stated here, beyond a reasonable doubt, that the error complained of did not contribute to the [9] verdict and the same verdict would have been returned in its absence. (*People v. Trice,* 127 Ill. App. 2d 310, 319, 262 N.E. 2d 276.) Under these circumstances, irrelevant and improperly suggestive testimony (*People v. Scott,* 52 Ill. 432, 441, 442, 288 N.E. 2d 478) and even error of constitutional dimension should be deemed harmless. *People v. Brown,* 51 Ill. 2d 271, 273, 281 N.E. 2d 682. See also *People v. Lucas,* 48 Ill. 2d 158, 162, 163, 269 N.E. 2d 285.

On oral argument, defendant cited *People v. Moore,* 9 Ill. App. 3d 231, 292 N.E. 2d 42. In that case, the second division of this court reversed a conviction where no objection was made to prejudicial closing argument in which the State's Attorney referred to the failure of defendant to support his alibi testimony, all elicited by cross-examination, by calling other witnesses. We note, however, that the court reached this result after examination of "the entire record" and it qualified the result reached by stating specifically that it was based "on the evidence in this case." (See 9 Ill. App. 3d at 232, 233.) Quite to the contrary, in the case at bar, an examination of the entire record here impels to the conclusion that the assailed final argument was not prejudicial and that the judgment appealed from should be affirmed.

Defendant urges that the final argument of the prosecutor may have misled the jury as regards the burden of proof. Not only did the prosecutor himself avoid this possible result, as shown by the above opinion, but the instructions of the court regarding burden of proof and presumption of innocence (State's Instruction No. 6, IPI-Criminal No. 2.03) and burden of proof on the issues in rape (State's Instruction No. 10, IPI-Criminal No. 9.03) were certainly sufficient to guide the jury properly in this regard.

[10] In this portion of the argument, defendant relies primarily on *People v. Weinstein,* 35 Ill. 2d 467, 220 N.E. 2d 432. That case is inapplicable here. As pointed out by the Supreme Court, the prosecutor there manifestly prejudiced the defendant by repeated assertions regarding the burden of defendant to introduce evidence to create a reasonable doubt of guilt. The court also pointed out other improper argument by the prosecutor. Furthermore, the prosecution in the *Weinstein* case was based upon circumstantial evidence.

Nor can defendant avail himself of his argument of inconsistency because the jury found him not guilty of robbery. Illinois adheres to the rule that logical consistency in verdicts is not necessary provided that the verdicts are not legally inconsistent. See *People v. Hairston,* 46 Ill. 2d 348, 361, 362, 263 N.E. 2d 840. Note also *People v. Lamb,* 10 Ill. App. 3d 935, — N.E. 2d — where the same argument was rejected where a jury found defendant not guilty of burglary but guilty of theft.

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,
PLAINTIFF-APPELLEE,
—VS—
BEN E. BROWDER,
DEFENDANT-APPELLANT.
No. 46103

PETITION FOR APPEAL AS A MATTER OF RIGHT, OR IN THE ALTERNATIVE, FOR LEAVE TO APPEAL

• • •

III. *Points Relied upon for Reversal of the Judgment of the Appellate Court*

• • •

Where a defendant was convicted solely on the basis of evidence tainted by his unlawful arrest;

Where defendant's trial strategy was to suppress the fruits of the unlawful arrest, and where defense counsel elicited testimony showing that the arrest was made without probable cause and without a warrant in a situation requiring a warrant;

Where defense counsel inadvertently failed to pinpoint the unlawful arrest as the basis of the motions to suppress the fruits of the arrest:

2. Is the Illinois waiver rule properly applied when it denied defendant a fair opportunity to raise and have adjudicated on direct appeal his Fourth Amendment claims, when the factual basis for these claims is clear from the trial court record?

• • •

IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS
—VS—
BEN E. BROWDER
Indictment No. 71-1081

MOTION TO SUPPRESS STATEMENTS

Now comes BEN E. BROWDER, by his attorney, GERALD W. GETTY, Public Defender of Cook County, through HARRY MISSIRLIAN, Assistant Public Defender, and moves this Honorable Court to suppress as evidence herein any and all confessions, statements or admissions of defendant made at the time of and after his arrest, and as grounds therefor states as follows:

1. That defendant was arrested on Jan. 30, 1971 in the vicinity of 4053 W. Monroe.

2. That prior to his interrogation at the time of his arrest, or at any time thereafter, the defendant was not, properly and adequately:

a) Informed that he had a right to remain silent;
b) Informed that anything he might say could be used against him in court;
c) Informed that he had a right to consult with a lawyer;
d) Informed that he had a right to have a lawyer with him during his interrogation; and,
e) Informed that if he was indigent he would nonetheless be provided with a lawyer if he so desired.

3. That any purported waiver of the above rights was not made voluntarily, knowingly and intelligently.

4. That any and all confessions, statements or admissions of the defendant, made at the time of and/or after his arrest, were, therefore, elicited in violation of his Constitutional Rights under the Fifth Amendment of the Constitution of the United States, (*Miranda v. Arizona*, 384 US 436.)

5. Petitioner further states that any statements elicited from him were the direct or indirect result of "e/i/t/h/e/r p/h/y/s/i/c/a/l o/r" mental coercion and were therefore, involuntary.

WHEREFORE, defendant asks that this Honorable Court suppress as evidence herein any and all confessions, statements, or admissions, whether written or oral, inculpatory or exculpatory, made by him at the time of or subsequent to his arrest.

GERALD W. GETTY
Public Defender of Cook County

By: /s/ Harry Missirlian
By:
Assistant Public Defender
/s/ Ben E. Browder

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CRIMINAL DIVISION

(TITLE OMITTED IN PRINTING)

Report of Proceedings

[Testimony at hearings on motions to suppress, August 23, 1971, before the Honorable Philip Romiti, Judge. Patrick Driscoll and Richard Salas, Assistant State's Attorneys, appeared for the state; Harry Missirlian, Assistant Public Defender, appeared for the defendant.]

• • •

[2] THE COURT: We are proceeding first on what motion, gentlemen?

MR. MISSIRLIAN: Motion to suppress identification.

• • •

(Testimony of Miss Johnnie Mae Johnson, direct examination by defense counsel, Mr. Missirlian.)

• • •

[3] MR. MISSIRLIAN: Directing your attention to January 31, 1971, were you in the 11th District police station?

MISS JOHNSON: Was that a Sunday? Yes.

• • •

[5] Q. Did you view a lineup?

A. Yes.

• • •

[6] Q. Did somebody else view the lineup with you?

A. Yes.

Q. Do you remember that person's name or those persons?

A. Other than my mother I don't know the other persons' names.

Q. Was it a male or a female?

A. Females.

Q. At that time did you make an identification?

A. Yes.

P. And did this female also make an identification?

A. After I didn, yes.

Q. After you did?

A. Yes.

• • •

Q. When you made this identification did you identify the defendant in this cause, Ben Browder?

[7] A. Yes.

Q. And at that time did you have an occasion to observe whether Mr. Browder was wearing a cast or a bandage on his hand?

A. What do you mean?

Q. Well, was Ben Browder wearing a cast?

THE COURT: Did he have a cast or bandage on his arm?

THE WITNESS: Yes.

THE COURT: All right.

MR. MISSIRLIAN: Q. Did any of the other men in the line-up—were they wearing a cast or bandage on their arms?

A. No.

• • •

[8] Q. Do you remember how Mr. Browder was dressed on January 31st, 1971, at the police station?

A. Not exactly but I remember some things.

[9] Q. Well, could you tell us what you remember?

A. Khaki pants and the white tam and black coat. That is all.

Q. He was wearing that on January 31st at the police station?

A. Yes.

Q. And he had a green coat on, did you say? What color coat was he wearing?

A. On the day at the police station a black coat.

Q. A black coat?

A. Yes.

Q. And he was wearing a white tam at the police station?

A. Yes.

Q. When you say white tam would you describe to the Court what you mean?

A. Just a white hat with a little ball on the top.

Q. Was there anybody else in that lineup wearing a white tam?

A. Not a white tam but hats maybe.

Q. I didn't hear you.

A. No one else wearing a white tam.

• • •

(Testimony of Martin Conroy, direct examination by the prosecution, Mr. Salas.)

• • •

[29] MR. SALAS: What is your occupation, Mr. Conroy?

MR. CONROY: I'm a police officer assigned to the Youth's Division.

[30] Q. How long have you been employed—are you employed by the City of Chicago?

A. Just over five years.

Q. That is for the City of Chicago Police Department, is that correct?

A. Yes, sir.

Q. Now Officer, directing your attention to the date of January 29th, 1971, did you have occasion to have an assignment at that time?

A. Regarding this incident I received the assignment on the 31st.

Q. Did you receive an assignment on January 29th, 1971?

A. No, sir. I was assigned to a rape that occurred on the 29th——

MR. MISSIRLIAN: Objection.

THE COURT: Sustained.

MR. SALAS: Q. Were you assigned on January 30th?

A. 31st.

Q. Where, if anywhere, did you go, Officer?

A. I went to my files at the Youth Division at the 11th District.

Q. And at that time did you have occasion to—what, if anything, did you do after that?

[31] A. Well, I had information regarding a rape of a Sharon Alexander and a possible offender by the name of Browder.

Q. After this possible offender by the name of Browder, you received this information, what, if anything, did you do then?

A. I checked my file to see if I had a listing and I had Tyrone Browder who lived at 4053 on Monroe.

Q. Did you have occasion to call the home of one Tyrone Browder?

A. Yes, I did.
Q. And who, if anyone, did you talk to on the phone?
A. I talked to the mother, Mrs. Browder.
Q. And did that person identify herself?
A. Yes, sir.
Q. Did you have occasion to inquire at that time as to the whereabouts of one Tyrone Browder?
A. Yes, I did.
Q. And what, if anything, did you ask this person?

MR. MISSIRLIAN: Your Honor, I'm going to object. I don't know what—this is beyond the scope.

THE COURT: I don't know where he is going. I [32] will overrule the objection. I presume it is going to be relevant. I assume you are going to tie it in?

MR. SALAS: Yes.

THE COURT: We have a motion to suppress identification. Proceed.

MR. SALAS: Q. Now did you have occasion to go to the Browder residence?
A. Yes, I did.
Q. And at that time did you have occasion to see the defendant?
A. Yes, sir.
Q. And is this person who you saw at that residence present in this court room?
A. Yes.
Q. Will you indicate who he is?
A. With the black jacket on at the table.
Q. Did you arrest him at that time?
A. Yes, I did.
Q. And did you then take him into custody?
A. Yes, sir.
Q. Now when you took him into custody approximately what time was that?
A. I believe it was approximately 6:00 o'clock, 5:30, 6:00 o'clock in the evening on the 31st.
[33] Q. When you went to the Browder residence did you arrest anyone other than Ben Browder?
A. Yes, sir, I arrested his brother Tyrone.
Q. And when you went to the station were you present at the time that a lineup was conducted?
A. Yes, sir, I was.

• • •

Q. Was there any identification made during the time that you were present?
A. Yes, sir, there was.
Q. And who, if anyone, made an identification at that time?
A. Sharon Alexander was the first to view the lineup and she identified Ben earlier, Ben Browder earlier and touched him as indicating he was the one [34] and then we asked her to leave the room and we brought Johnnie Mae Johnson in and she identified Ben Browder and she touched him.

• • •

MR. SALAS: Q. Officer, directing your attention back to the time you called the Browder residence. What, if anything, did you ask Mrs. Browder?

MR. MISSIRLIAN: Your Honor, I'm going to object.

MR. SALAS: Your Honor, I'm going to tie this up.

THE COURT: Overruled.

MR. SALAS: Q. What, if anything, did you ask Mrs. Browder?
A. I asked Mrs. Browder if her son was home.
Q. Which son?
A. Tyrone.
Q. And did you say anything else?
[35] A. Yes, sir. I said that it was regarding an assault on a girl.
Q. What, if anything, did Mrs. Browder say to you?
A. Mrs. Browder said that she didn't think it would be Tyrone but it might possibly be her son Ben Earl.
Q. Now directing your attention to the lineup, do you remember how many people were in that lineup?
A. There were five suspects in the lineup.
Q. And were there any—were the people in the lineup—would you describe their heights, their respective heights?
A. About five-seven to five-nine.
Q. Were they all approximately the same height?
A. Yes, sir, one or two a little taller and three of them were about the same height.
Q. Were they approximately the same age?
A. Yes, sir.
Q. Were they all approximately the same race?
A. Yes, sir, they were.

• • •

[36] CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer Conroy, what was the date that you went over to the Browder residence?
A. It was the 31st, sir.
Q. The 31st, this is the day also of the lineup?
A. The day of the arrest, yes, sir.
Q. And you arrested four individuals at the [37] Browder residence?
A. Yes, sir.
Q. What did you charge each four with?
A. While at the residence I told Mrs. Browder that we had a case of rape——
Q. No, I didn't ask you that. I asked you what did you charge them with?
A. They were investigation of rape.
Q. And did you tell each four of these individuals at the home that they were under arrest for rape?
A. Yes, sir, I took them into custody.
Q. And were you with other officers, other police officers when you were there?
A. Yes.
Q. And when you transported these four men to the police station were they handcuffed?
A. No, sir.

• • •

[38] Q. Now you testified that Miss Alexander and Miss Johnson viewed the lineup separately?
A. Yes, sir, they did.
Q. And Miss Alexander was the first?
A. Yes.
Q. Did they ever view the lineup together?
A. No, sir.
Q. To your knowledge did Miss Johnson ever talk to Miss Alexander or see Miss Alexander before the lineup?
A. I was upstairs assisting, conducting the lineup when the Alexander family come in. I had them sit down in the lobby of the first floor and we expected Johnnie Mae Johnson and her family and I don't know if they talked together or not.

Q. But in any event they didn't view the lineup together?
A. No, sir, they did not.

• • •

[39] Q. And when you arrested Mr. Browder at his home was his hand, his right hand in a bandage?
A. Yes, sir, it was.
Q. And when this lineup was conducted was his right hand also in a bandage?
A. Yes, sir, it was.
Q. Was any other person in that lineup, were they wearing a bandage on their right hand?
A. No, sir.

• • •

[40] Q. Now when you went to the Browder residence you went their specifically to talk to Tyrone, Ben's brother?
A. After the conversation with his mother I went there to talk to both of them, Ben Earl and Tyrone.

• • •

(Testimony of Chris Ahern, direct examination for the prosecution by Mr. Salas.)

[41] Q. Would you give us your full name and spell your last name, sir?
A. Officer Chris Ahern, A-h-e-r-n.
Q. What is your occupation?
A. Police officer of the City of Chicago.
Q. How long have you been employed?
A. Nine years.
Q. Directing your attention to the date of January 31st, 1971, were you working on that day?
A. Yes, I was.
Q. And where, if anywhere, were you?
A. I was at Area 4 Youth, assigned to Crime Car 8414.
Q. Did you have occasion during that day to be at the 11th District police station?
A. Yes, I did. I was assisting Officer Conroy and Officer O'Driscoll in an arrest.
Q. And did you have occasion to conduct a lineup?
[42] A. Yes, I did.
Q. Now in gathering the people to put in this lineup did you assist in that?

A. Yes, I did. I conducted the lineup at the 11th District station for Officer Conroy and O'Driscoll.

• • •

Q. Now at the time of the lineup or lineups—well, first of all, was there one lineup conducted?

A. No, there was two lineups conducted.

Q. And who was present during the time of these lineups?

A. I believe the Johnson girl was one of the [43] parties present and the other party I'm not sure of the name. I just conducted the lineup.

Q. Were both of these parties present at the same time?

A. No, separately. I had an individual lineup for each one of the victims.

• • •

[44] Q. Did you have occasion to observe Mr. Ben Browder at that time?

A. Yes, I did.

Q. And what, if anything, was he wearing?

A. He had on a wool type of tam type hat and I noticed he had—his right hand was in a cast. I believe he stated he got shot and that is why he stated it was in a cast——

MR. MISSIRLIAN: Your Honor, I'm going to object.

THE COURT: Sustained.

• • •

[45] CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer Ahern, prior to conducting this lineup did you have an opportunity to talk to Johnnie Mae Johnson?

A. No, I didn't.

Q. And when this lineup was conducted there were actually two lineups conducted?

A. There was two lineups conducted. One for each of the victims.

Q. Which one of the girls viewed the lineup first?

A. I believe it was Johnson, I'm not sure. Like I said before, counsel, I just made the lineup procedures.

Q. Well, at any time was Sharon Alexander and Johnnie Mae Johnson in the same room when the lineup [46] was conducted?

A. No.

Q. So at no time could Miss Alexander have identified Mr. Browder and still have Johnnie Mae Johnson in the room?

A. No.

• • •

[47] MR. DRISCOLL: Judge, can I address myself to the motion to suppress statement?

THE COURT: Yes.

MR. DRISCOLL: First of all Allegation No. 5 that the statements were direct or indirect results of physical or mental coercion——

THE COURT: Paragraph 5.

MR. MISSIRLIAN: I would ask that physical coercion be stricken and specify mental coercion.

THE COURT: All right. So that the paragraph will read that any statement direct or indirect results [48] of mental coercion, is that correct?

MR. MISSIRLIAN: Yes.

• • •

(Testimony of Martin Conroy, direct examination on behalf of the prosecution by Mr. Salas.)

• • •

[49] Q. You are the same Martin Conroy that testified on the prior motion to suppress identification?

A. Yes, sir.

Q. Directing your attention to January 31st, 1971, did you have an occasion to affectuate the arrest of one Ben Browder?

A. Yes, I did.

Q. Where, if anywhere, did that arrest occur?

A. It occurred in the living room of his home.

Q. At the time that you arrested him did you inform him of what he was charged with?

[50] A. Yes, sir, I did.

Q. And did you say anything to him at that time?

A. Yes, sir, I informed him of his constitutional rights.

Q. What specifically did you say to him?

A. I said that he had the right to remain silent and the right to an attorney to be present before any questioning and if he couldn't or his parents couldn't afford an attorney one would be appointed free of charge to be present before

any questioning. That anything he said would be used in evidence against him in a court of law.

Q. And did you ask the defendant whether or not he understood these rights?

A. Yes, I did.

Q. And did he say anything to you?

A. He shrugged his shoulders and said he understood them.

Q. Did you then take the defendant into custody?

A. Yes, sir.

Q. Now where did you take him?

A. Took him directly to the 11th District on the second floor.

Q. And where on the second floor specifically [51] did you take him?

A. It's kind of a hallway outside the youth division office.

Q. Now approximately what time was that?

A. About six o'clock in the evening.

Q. Would that be approximately the same time the lineup was conducted?

A. About a half hour after that.

Q. Now at that time who was present, at the time that the defendant was in custody?

A. My three partners, Ahern, Toughy and O'Driscoll, his brother, Tyrone, and two other boys that we picked up in the Browder home.

Q. After the lineup did you have an occasion to have a conversation with the defendant?

A. Yes, I did.

Q. Who was present at that time?

A. After the identification Tyrone asked to speak to me and my partner and I went into the sergeant's office on the second floor.

Q. It was your partner and you and Mr. Browder, is that correct?

A. Yes, Ben Earl.

Q. And at that time did you make any statement [52] to the defendant?

A. Yes, sir, I did.

Q. What, if anything, did you say to him?

A. I said—first he told me that he would like to say that he did commit the rape on Johnnie Mae Johnson but he did not commit the rape on Sharon Alexander and I said—

I had to re-inform him of his rights because he made an admission of sorts.

Q. What specifically did he say?

A. He said that he did accost Johnnie Mae Johnson on the street, I don't recall the address but he took her to a gangway and there he had sexual intercourse with her. I asked him if he had any deviate sexual act and he said no. I said did you have a gun and he said no but he did admit to the rape.

Q. At the time that you admonished the defendant of his rights who was present?

THE COURT: Where? He said he did it twice.

MR. SALAS: Q. The first time who was present at the Browder home?

A. At the Browder home there was Ben Earl, his brother Tyrone, the two boys, I don't really recall their names but we arrested them and they stood in the lineup, his mother and a couple of other people in the house.

[53] Q. At the time that you so advised him at the 11th District who was present at that time?

A. My partner and myself and Ben Earl.

Q. What is the name of your partner, sir?

A. Frank O'Driscoll.

Q. Now during the period of the questioning, Officer, had Mr. Browder ever requested the presence of an attorney?

A. No, sir, he did not.

Q. Did he request that you terminate any questions, that you refrain from questioning him?

A. No, sir.

Q. Did he ask for an attorney?

A. No, sir.

Q. Did he ask to have any member of his family present?

A. No, sir.

MR. SALAS: Nothing further.

THE COURT: Cross.

CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. While you were at the Browder residence, Officer Conroy, did you have a conversation with the defendant, Ben Browder?

[54] A. Yes, sir, I did.

Q. And at that time you informed him of his constitutional rights prior to the conversation?

A. There was some conversation just prior to informing him of his rights.

Q. Did you inform the other three individuals that were arrested of their rights?

A. Yes.

Q. And you arrested them all on the charge of rape?

A. Inv stigation of a rape.

Q. Investigation of a rape?

A. Yes, sir.

Q. And after you had advised Mr. Browder that he was under arrest for investigation of rape and you had informed him of his rights didn't he in fact deny any knowledge of these rapes?

A. Yes, sir, prior to the showup in the home he did deny it.

Q. And you were present at the time of the show up?

A. Yes, sir.

Q. And prior to the show up did you inform Mr. Browder that he had a right to an attorney to be [55] present at the show up?

A. Yes, sir.

Mr. Driscoll: Objection.

The Court: Sustained.

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Mr. Missirlian: Q. Now the second time you informed Mr. Browder of his rights who was present?

A. Ben Earl Browder and my partner Frank O'Driscoll.

[56] Q. O'Driscoll?

A. Right.

Q. Were there any other police officers present?

A. None in that room itself.

Q. And this is when he made this alleged admission?

A. Yes, sir.

Q. This was after the identification by Miss Johnson?

A. This is after the show up was completed.

Q. Now when he made this alleged statement he denied having a gun?

A. Yes, sir, he did.

Q. Where were the other three men or four men in the the lineup?

A. One was returned to the lock up and the other three were released.

Q. Did Mr. Browder's brother ask to stay there?

A. No, sir.

Q. Well, when you were—

A. Not that I can recall.

Q. This interrogation of Mr. Browder, did you ask him if he wanted his brother present?

A. No, sir.

[57] Q. To your knowledge had his brother already left the station?

A. Yes, sir, I believe he did. I don't know.

Q. Now when you first informed Mr. Browder of his rights at his home he denied knowledge and involvement in these offenses, isn't that correct?

A. Yes, sir.

Q. And when he denied this knowledge and involvement in these offenses when you gave him these rights at his residence his mother and his brother and two friends were present?

A. Yes, sir.

Q. And he made admissions at the police station when no one but police officers were around?

A. Yes, sir.

Q. Were there any other admissions that day in your presence by Mr. Browder?

A. Yes, sir.

Q. Where and who was present?

A. Investigator Thomas from Area 4 Homicide. Ben Earl told me that he did commit the rape on Johnnie Mae, I told the homicide investigator and he took him into this other like ante room where he took a statement or an admission.

[58] Q. Where you present?

A. Yes, sir.

Q. And did you ask Mr. Browder to sign this statement?

A. I didn't speak at all. I was just present.

Q. Was there a court reporter present when this statement was taken?

A. No, sir.

Q. Did Mr. Thomas or Officer Thomas inform Mr. Browder of his rights?

A. Yes, sir, he did.

Q. And at the time this statement was taken did you ask Mr. Browder if he wanted to make a written statement?

A. I didn't ask him anything. I left it to the investigator.

Q. Did Investigator Thomas ask him if he wanted to make a written statement?

A. I don't recall, sir.

Q. Other than you and Investigator Thomas who else was in that room when this statement was being taken?

A. I don't know. There were a couple of other policemen. I don't know exactly which ones were there.

Q. Were any of the other policemen asking Mr. [59] Browder questions?

A. No, sir.

Q. Now when Mr. Browder made this alleged statement after the lineup how long had he been under arrest up to that time?

A. I think about an hour, an hour and a half. I don't know exactly.

Q. And this is after he had been identified by two girls, Sharon Alexander and Johnnie Mae Johnson?

A. Yes, sir.

Q. Were there any statements taken from Mr. Browder after January 31st, 1971?

A. I don't know. I didn't take any.

Q. Now Officer Conroy, when you were at the Browder residence on January 31st, 1971, after you made the arrest of Ben Browder did you search him?

A. Yes, sir, I believe we put a cursory search for weapons.

Q. Did you search the other three individuals there?

A. Yes, sir.

Q. Did you search the apartment?

A. No, sir.

Q. Did you ask to search the apartment?

[60] MR. DRISCOLL: Objection.

THE COURT: Sustained.

MR. MISSIRLIAN: Q. When you informed Mr. Browder of his rights at his home did you read this to him from a card?

A. No, sir.

Q. At the police station did you read it from a card?

A. No, sir.

Q. Did you ask him if he understood?

A. Yes, sir.

Q. How long did it take to conduct this interrogation of Mr. Browder at the police station?

A. I think from the time we walked in until the time he got to the lock up it might have been about two hours.

THE COURT: From the time you walked in when? Would you clarify that for me, counsel?

MR. MISSIRLIAN: Q. You mean the time you walked into the police station to the time you took Mr. Browder back to the lock up after this statement and after the show up?

A. Yes, sir.

THE COURT: The whole thing took—through the [61] lineup and everything took about two hours?

THE WITNESS: Yes, sir.

MR. MISSIRLIAN: Q. Well, how long did just the taking of these oral statements take?

A. The oral statement I took might have been about five or ten minutes and then Investigator Thomas I think had him another. I don't know, fifteen minutes or so, twenty minutes.

MR. MISSIRLIAN: That is all I have.

THE COURT: Redirect?

MR. SALAS: Yes.

REDIRECT EXAMINATION

By MR. SALAS:

Q. Officer Conroy, who was present at the time of the second statement?

A. The investigator from homicide, Thomas, myself and I don't know who exactly. We had three youth officers were working with me and he and a partner. I don't know exactly who else was there.

Q. Officer Thomas, you mean Investigator Thomas, his partner—

A. His partner might have been there. I don't know.

Q. Now after Mr. Browder made his first [62] statement to you did you ask him to make any further statements?

A. Yes, sir. I got a hold of the investigator and I told him he admitted that Johnnie Mae——

Q. Yes, but did you ask him to repeat his statement?
A. In front of the investigator?
Q. Yes.
A. Yes, sir.
Q. Did he agree to do so?
A. Yes, sir.

MR. SALAS: Nothing further.
THE COURT: Any recross?
MR. MISSIRLIAN: Just a couple of questions.

RECROSS EXAMINATION

By MR. MISSIRLIAN:

Q. When you took Mr. Browder down to the police station didn't his mother ask to go along?
A. I really don't recall. I don't think we had room.
Q. You don't recall or you don't know?
A. I don't recall.
Q. And when Mr. Browder was at the police station didn't his mother come down later on and ask [63] to see her son?
A. I don't recall.
Q. At the time of Mr. Browder's arrest do you know hold old he was?
A. I know he was approximately 17 or 18. I didn't know his exact age.

MR. MISSIRLIAN: I don't have any more questions.
THE COURT: All right, you may step down.
(Witness excused.)

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(Direct examination of John Toughey on behalf of the prosecution by Mr. Salas.)

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[64] Q. And what is your occupation?
A. I'm a youth officer employed—my location of employment is 943 West Maxwell.
Q. Are you employed by the Chicago Police Department?
A. That is correct.
Q. Now directing your attention to January 31st, 1971, Investigator, were you working on that day?
A. Yes, I was.

Q. Directing your attention to the evening hours, the early evening hours, did you have occasion to be at the 11th District police station?
A. I did.
Q. And at that time were you present at the time of the lineup was conducted?
A. Yes, I was.
Q. Now after this lineup was conducted did you have occasion to see anyone who you now see in the court room today?
A. Yes.
Q. Would you point him out?
A. Mr. Ben Browder.
Q. Indicating the defendant, Ben Browder. After you saw the defendant did you see the defendant do [65] anything?

MR. MISSIRLIAN: When?
THE COURT: Well, pick a time a little bit more——

MR. SALAS: Q. At the time you saw the defendant, Ben Browder, approximately what time was that, Officer?
A. Well, we were at the home first, then we came to the station and that was approximately 6:30 I would guess offhand. I don't have the report with me.
Q. And who else was present at the time?
A. At the lineup there was present——
Q. Not at the lineup. After the lineup.
A. After the lineup there was his brother and two other boys that came from the house with us, I don't know what their names were, and three other officers and myself that were working on the case.
Q. What three other officers?
A. Officers O'Driscoll, Conroy and Ahern.
Q. After the lineup what, if anything, occurred?
A. After the lineup Mr. Browder asked Officer Conroy if he could speak to him away from the group of us, so Officer Conroy agreed to this but then he stated that Officer O'Driscoll would have to accompany him because of security at this time, he had been identified at this time so Officer O'Driscoll and Officer Conroy [66] went into another office which we call our JYD office which we use as the facilities in the 11th District.
Q. And did Mr. Browder and the officers go into that room?

A. Yes, they did.
Q. Did you go into the room at any time?
A. No, I wasn't in that room. I didn't enter that room.
Q. At the time that Mr. Browder was arrested did you make any statement to him?
A. At the time he was arrested?
Q. Yes.
A. At his home we advised him of the rights and then we accompanied him to the 11th District——

MR. MISSIRLIAN: Your Honor——
THE COURT: Objection sustained.

MR. SALAS: Q. Who made any statement to Mr. Browder at that time?
A. At the house I didn't make any statement. I don't remember offhand who was talking to Mr. Browder. I believe it was Officer Conroy but I'm not positive as to—somebody made the statement to him originally.
Q. What, if anything, was said to him?
A. He was advised of his rights at the house [67] and——
Q. Specifically, what was stated?
A. I don't remember the specific wording. It was to the effect we were investigating—it was a rape investigation and we wanted him to come with us. The effect was to go into the 11th District so we could clear up the investigation.
Q. Was he placed under arrest at that time?
A. Yes, he was.
Q. After he was placed under arrest what was said to him, if anything?
A. That we would go into the 11th District and this lineup would be conducted regarding this investigation.
Q. At the time he was arrested at the house who was present?
A. His mother, his brother, two other boys, I believe younger children but I don't remember offhand. There was quite a few people in the house.
Q. What, if anything, did Officer Conroy state to him?
A. Officer Conroy of course advised him that he was under arrest for the investigation——
Q. Specifically what did he state to him?

THE COURT: Did Conroy and Browder have a [68] conversation?
THE WITNESS: In the house?

THE COURT: Did they have a conversation in the house at that time?
THE WITNESS: As to the advising him of his arrest. I don't remember any other conversation.
THE COURT: Well, did Conroy say something to the defendant?
THE WITNESS: Yes.
THE COURT: What did he say?
THE WITNESS: What he stated was we were at the house and we had his name in connection with the rape investigation.

MR. SALAS: Q. And what did he state?
A. I don't remember offhand. I don't recall.
Q. Now after advising him he was under arrest regarding the investigation what specifically did Officer Conroy state to him after that?

MR. MISSIRLIAN: Your Honor, this has been asked and answered.
THE COURT: He may answer again.
THE WITNESS: I don't recall. What happened was I went into the kitchen and I was interviewing some other people—
[69] MR. MISSIRLIAN: Objection.
THE COURT: Sustained.

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MR. SALAS: Q. Were you present during the whole period that the defendant was placed under arrest?
A. When we went into the house I was present at that time. I was in the house when the arrest was made.
Q. Now at the time you took Mr. Browder to the station did you make any statement to him?
A. To Mr. Browder?
Q. Yes.
A. No, I didn't.
Q. Did any officer make any statement to Mr. Browder while you were present?

MR. MISSIRLIAN: Your Honor, I'm going to object——
A. Officer——
THE COURT: Pardon?
MR. MISSIRLIAN: As to when?
[70] THE COURT: Well, time, yes. We have some time period involved. Sustained.

MR. SALAS: Q. Officer, did you have occasion to leave the presence of the defendant while you were at the house at any time?

A. Yes, I did.

MR. SALAS: Nothing further.

THE COURT: You may cross.

CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer Toughy, you were present when Officer Conroy informed the defendant, Mr. Browder, and the other individuals that—the other male individuals that were there that they were under arrest for investigation of a rape?

A. Yes, this was in the house, yes.

Q. And were you also present when Mr. Browder denied any knowledge or involvement of a rape?

A. I don't remember if there was a denial. There was a conversation but at the time——

Q. But did you——

A. Not offhand, no.

Q. Were you present when Mrs. Browder asked to go to the police station?

[71] A. Yes, I was.

Q. And was she informed that she couldn't go to the police station?

A. No, she wasn't.

Q. Were you present at the police station when Mr. Browder's brother called his mother after the lineup?

MR. SALAS: Objection.

THE COURT: Sustained.

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MR. MISSIRLIAN: Q. Well, while you were at the police station, the 11th District, did you see Mrs. Browder?

A. No, I didn't.

Q. When you arrived at the police station with Ben Browder, Tyrone Browder and the other two individuals was Johnnie Mae Johnson and Sharon Alexander already there?

A. No, they weren't, not that I recall. I don't believe they were.

Q. You don't believe or you don't know?

A. No, they weren't there.

[72] MR. MISSIRLIAN: That is all.

REDIRECT EXAMINATION

By MR. SALAS:

Q. Officer, regarding this conversation with Mrs. Browder, did you ask her whether or not she wanted to accompany you to the station?

A. Yes, I asked her at the home.

Q. What, if anything, did she say?

A. She said no, I do not want to go with you.

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(Direct examination of Francis O'Driscoll on behalf of the prosecution by Mr. Driscoll.)

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[73] Q. What is your business or occupation?

A. I'm a youth officer currently assigned to Area 4 Youth.

Q. How long have you been so employed?

A. I have been a police officer for 15 and a half years and have been assigned to Area 4 Youth for two and a half years.

Q. Now were you so assigned and employed on January 31st, 1971?

A. Yes, I was.

Q. Were you working alone or with a partner?

A. I was working with Officer Conrad and also with Officer Toughy and Ahern.

Q. Conroy?

A. Conroy.

Q. Now calling your attention to January 31st, 1971, were you assigned to the investigation of any case?

A. Yes, we were assigned to a rape investigation.

Q. Where, if anywhere, did you go upon assignment to this investigation?

A. We went to the Browder home at 4053 West Monroe, I believe it is.

[74] Q. Did you have occasion to see anybody when you got to that location?

A. We were greeted at the door by I believe it was either Mr. or Mrs. Browder.

Q. Did you have occasion to see anyone else inside the house?

A. There was a number of people inside there, it seems to me about six or eight people, maybe more.

Q. Did you have an occasion to make any arrests at that location?

A. Yes, we did.

Q. Look around the court room today, Officer, and see if you see anyone in court that was arrested on January 31st.

A. The man seated at the table.

Q. What color clothing is he wearing?

A. He has levis and leather jacket and T shirt.

Q. Indicating for the record the defendant, Ben Browder. Who was present at the time the defendant was placed under arrest?

A. You mean as far as police officers were concerned?

Q. Yes, police officers.

A. There was Officer Ahern, Officer Toughy, [75] Officer Conroy and myself.

Q. Did any police officers say anything to the defendant at the time he was placed under arrest?

A. I believe Officer Conroy advised Mr. Browder of his rights.

Q. What specifically was said to him?

A. That he had a right—you mean what are the rights, state the rights?

Q. Yes. What specifically was said?

A. That he had a right to an attorney; that the State would provide an attorney if he didn't have the funds; he had a right to remain silent—I have it on my card.

Q. Do you recall specifically what was said to him, in substance?

A. In substance, yes.

Q. What, if anything, else was said after he was told he had a right to remain silent?

A. We asked him if he understood that and he said yes.

Q. And where were you at the time this was said?

A. I was in the doorway.

Q. Did you yourself advise the defendant of his rights or did someone else?

[76] A. Conroy advised him of his rights.

Q. Where was the defendant's mother at that time?

A. I believe she was—there was a room between the front room and the dining room——

Q. Was the defendant taken from the house?

A. He was requested to come with us and his mother stated that he would go with us and also three or four other boys were there.

Q. Now did Mrs. Browder accompany you to the police station?

A. No, Mrs. Browder did not accompany us to the police station.

Q. Did you ask her if she would like to go?

A. Yes, we did.

Q. And what, if anything, did she say?

A. She said no.

Q. Did you have an occasion to— strike that. Where, if anywhere, did you go after leaving the Browder home?

Q. Where did you go?

A. We went to the Fillmore station.

Q. Is that the 11th District?

[77] A. The 11th District station, right.

Q. Would you tell the Court what, if anything, you did relative to this case and your arrival at the station?

A. We made an arrest slip on Mr. Browder and then we had a conversation with Mr. Browder in the sergeant's office on the second floor.

Q. Who was present at that time?

A. Officer Conroy and myself, and Mr. Browder.

Q. What, if anything, did Officer Conroy say at that time?

A. He asked him——

Q. Without going into the statement did Officer Conroy say anything to him prior to the defendant making a statement?

A. I don't understand the question.

Q. Did Officer Conroy say anything to the defendant when he got into this room when you were present?

A. I believe he did. He asked him about the rape and Browder says yes——

Q. Without going into it, the defendant made a statement?

A. He made a statement, yes.

Q. Did you later see any other investigator [78] from a different unit other than your own?

A. Yes, Investigator Thomas and I believe it was Weininger.

Q. And were you present with Officer Thomas in the same room with the defendant?

A. Yes, I was.
Q. Who else was present, if anyone?
A. Officer Conroy.
Q. Was Officer Thomas present?
A. And Officer Thomas and Mr. Browder also.
Q. Did the defendant then make a statement?
A. Yes, he did.
Q. Now at any time did the defendant ever request an attorney being present?
A. No, he did not.
Q. Did he ever request to have his mother present?

MR. MISSIRLIAN: Judge, I'm going to object to the form of the question.

THE COURT: Rephrase your question, counsel. Sustained as to form.

MR. DRISCOLL: Q. At that time the second statement was made in the presence of Officer Thomas did the defendant mention his mother at any time?
[79] A. No, he did not.
Q. Did he ever mention an attorney?
A. No, he did not.
Q. Did he ever complain of being mistreated in any manner?
A. No, he did not.

MR. DRISCOLL: That is all I have. No further questions.
MR. MISSIRLIAN: I have no questions.

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(Direct examination of Dan Thomas on behalf of the prosecution by Mr. Driscoll.)

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Q. Are you a police officer for the City of Chicago?
[80] A. Correct.
Q. How long have you been so employed?
A. Nine years.
Q. Were you so assigned and employed to Area 4 on January 31st, 1971?
A. Yes, I was.
Q. Now calling your attention to the evening hours about 6:30 P.M., did you have occasion to receive an assignment of a rape case?
A. Yes.

Q. Where, if anywhere, did you go upon receipt of that assignment?
A. To the Cook County Hospital.
Q. And after going to the Cook County Hospital did you have occasion to go to any police station?
A. Subsequent follow-up investigation?
Q. Yes.
A. Yes.
Q. And was this on the 31st of January?
A. Yes.
Q. What, if any, station did you go to?
A. To the Fillmore, 11th District.
Q. Did you have occasion to speak to any police officers at that location?
[81] A. Yes, sir.
Q. And do you recall the names of the officers that you saw?
A. Officers Conroy, Driscoll, Ahern and I don't really recall the other, all of Area 4.
Q. Officer Toughy?
A. Officer Toughy.
Q. Did you have occasion to see anyone that was in custody at that time?
A. Yes.
Q. Look around the court room today, Detective Thomas, and see if you see anyone here in court who was in custody on January 31st, 1971, relative to this case.
A. Yes, I do.
Q. Point out whom, if anyone, you see.
A. Subject known as Ben Earl, the last name of Browder.
Q. Indicating for the record the defendant, Ben E. Browder. Did you have an occasion to have a conversation with Mr. Browder?
A. Yes, I did.
Q. Where did that conversation take place?
A. It took place at the 11th District, the second floor.
[82] Q. Who was present at the time it took place?
A. I was present, Officer Conroy, Driscoll and my partner at that time was Reininger, R-e-i-n-i-n-g-e-r.
Q. And was your partner present for the entire statement?
A. Yes, he was.

Q. Now what, if anything, did you say to the defendant when you first saw him?

A. I advised him of his constitutional rights.

Q. What did you say to him specifically?

A. First I told him that he had a right to remain silent and anything stated to me by him would be used subsequently in a court of law. That he had a right to an attorney. That attorney could be present in any questioning and that if he could not afford the services of an attorney one would be appointed by the State and would be present for that questioning.

Q. Now did the defendant later give you a statement?

A. Yes, he did.

Q. At any time while you were in his presence did he make any complaint to you of the way he was treated by the police?

A. No.

[83] Q. Was there anything said by the defendant to his mother while you were present?

A. None.

Q. Was there any mention of an attorney by the defendant in your presence?

A. No.

Q. How long were you in the presence of the defendant, Ben Earl Browder?

A. I would say two minutes.

Q. Did you have occasion then to leave the police station?

A. No, I was busy making out papers at that time. I just talked to him for that matter of time and then I completed my work.

MR. DRISCOLL: That is all. I have no further questions. Thank you.

THE COURT: Cross.

CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer Thomas, when you informed the defendant of his constitutional rights, the right to remain silent, the right to have an attorney present, did you read these off a card?

A. No, I didn't.

[84] Q. And after you had questioned or prior to questioning him and after you had given him these rights did you ask him if he understood?

A. Yes, I did.

Q. And Officer O'Driscoll and Conroy were present at this time?

A. Would you repeat that, please?

Q. When you gave the defendant his constitutional rights, Officer O'Driscoll and Officer Conroy were present?

A. That is correct.

Q. And after you advised him of these rights did you ask him to make a written statement?

A. No, I didn't.

Q. Were you present when the lineup was conducted?

A. No.

Q. And Mr. Browder was only in that room with you for approximately two minutes?

A. Yes.

Q. Did he leave that room or did you leave that room after you had your conversation with him?

A. I believe he left that room.

Q. And when you had this conversation with him do you remember if he was handcuffed?

A. No, he was not handcuffed.

[85] Q. Did he ask to make a phone call while he was in that room?

A. No.

Q. Do you know if he asked to make a phone call prior to that?

A. I don't think so.

Q. Do you know if he asked for an attorney prior to your conversation with him?

A. Prior to my conversation?

Q. Yes.

A. No, I don't.

Q. Do you know, did he ask for his mother prior to the conversation with him?

A. No, I don't.

Q. Do you know how old he was when you had this conversation with him?

A. 17 years old.

MR. MISSIRLIAN: I don't have any more. That is all.

MR. DRISCOLL: No further questions. Thank you.

THE COURT: Step down.

(Witness excused.)

MR. DRISCOLL: Your Honor, on behalf of the People the Respondent rests on this motion.

[86] MR. MISSIRLIAN: The Petitioner would rest.

THE COURT: Are we ready to argue both motions? Shall we do that tonight?

MR. MISSIRLIAN: Yes.

THE COURT: All right, let's go ahead. Argue first on the motion to suppress identification or whichever way you want to go.

MR. MISSIRLIAN: This is fresh in my mind——

THE COURT: Let's argue.

MR. MISSIRLIAN: If that is all right with the State.

MR. DRISCOLL: Fine.

MR. MISSIRLIAN: Your Honor, I will be as brief as possible again. The Court has only heard four witnesses here testify, they're all police officers, all admitted to being present during the time that the rights were given.

The second officer who testified, Ahern, that he was out of the room for a short amount of time and that he was not present during the interrogation at the police station. The first officer who testified, that was Officer Conroy, that he gave the rights to the defendant, Mr. Browder, at his home.

At this time I would like to point out [87] that Officer O'Driscoll was present when these rights were allegedly given to the defendant. At that time when the Court attempted to— I'm sorry, Officer Ahern and O'Driscoll were present, yet neither one of them, one could not remember if they were given to him and the second could not recite them without going to his card.

Secondly, at the police station, this was after the defendant had been identified, it was after the defendant knew he had been identified by two rape victims the police allegedly again told him of his rights to remain silent, yet a statement was again taken.

Officer O'Driscoll testified he was present at the time the second statement and the third statement were— the first and second statement at the police station, yet he could not remember if the rights were given. He never testified that the defendant was given his Miranda warnings at the police station or when Officer Thomas saw him.

Officer Thomas testified that he gave the defendant his rights but he does not know what happened prior to bringing

in the defendant into that room. He doesn't know whether the defendant had asked for an [88] attorney prior to that or had asked to see his mother or remained silent and was coerced in any manner.

The statement by Officer Thomas was taken after an alleged statement was made to Officer Conroy——

THE COURT: Counsel, I don't get your point but go ahead.

MR. MISSIRLIAN: The statement that allegedly was made to Officer Thomas was made after the defendant had been identified and after there had been a statement taken by Officer Conroy at which time Officer Driscoll was present and at that time Officer O'Driscoll says he does not remember——

THE COURT: I got that point. Go ahead.

MR. MISSIRLIAN: Certainly we have two police officers in this case, one doesn't remember the rights being given and the second who cannot recite the rights without going to his card. That alone I think puts a question mark as to whether the rights were in fact given or whether they were coerced, if at all——

THE COURT: What were coerced, the rights?

MR. MISSIRLIAN: If the statement was coerced, if it was given——

THE COURT: Go ahead, Mr. Salas.

MR. SALAS: Yes, Your Honor. The Court's memory [89] serves it best. It was not that officer, Officer Toughy by the way was on the stand did not say that— could not remember whether or not the rights were given. The Court full well heard him say that rights were given. However, he did not state specifically what in fact those rights were.

Part of the time he was not in the presence of the defendant Browder but was busy talking to his mother and talking to other people. The person who best remembers the rights that were given was the person who in fact did admonish the defendant of his rights and that was Officer Conroy. Officer Conroy in fact told the defendant of every right that he had out of those rights which Miranda versus Arizona requires the officer give.

He did comply, he did give him his rights and did ask the defendant whether or not he understood them and the defendant answered yes. You see again, Your Honor, that at the station the voluntariness of the statement is shown because the defendant as was testified to by Officer Conroy

and was testified to by Officer Toughy stated the defendant called Officer Conroy over and said I want to make a statement to you and they went into the room and it was at that point that the defendant made his [90] statement.

They asked the defendant to repeat his statement. Again I think the voluntariness that was shown because the defendant readily at that point repeated his statement to Investigator Thomas who again advised him of his rights even though the first admonition of rights, Your Honor, is all that is necessary.

I submit that the officers did comply with that. Officer O'Driscoll did not remember specifically what was stated, however, Your Honor, did in fact state the rights were given. This Court has no evidence to show to the effect that these rights were not given and I would submit that the State has met its burden, Your Honor, and that the defendant was fully advised of his rights in any statement he gave were a result of his own will.

THE COURT: Anything further on this? Are we ready then to proceed on the motion to suppress identification?

MR. MISSIRLIAN: Your Honor, on the motion to suppress identification the petitioner only presented one witness, that was Miss Johnnie Mae Johnson. She testified that when she viewed the lineup that she viewed it with Sharon Alexander. That Sharon Alexander [91] was present during the time of the lineup and that she was the first to make the identification.

She also testified that at the time the officer came to interrogate her when she made her complaint about this rape she gave a description. One of the facts in the description was that the man who allegedly attacked her was wearing an earring and had his hand— one of his hands or arm wrapped up in either a cast or bandage. At the time she viewed the lineup the only man in that lineup with a bandage and an earring in his ear was the defendant, Mr. Ben Browder.

Secondly, Miss Johnnie Mae Johnson testified that the rape occurred in a dark room, that when she was led into that room there was a preceding room with a light on but at that time the man who attacked her was behind her or holding her with a gun at her throat and an arm around her neck, that she did not view the man at that time.

The only time she says she got a good clear view of the

man who attacked her was in the darkened room while she was being attacked——

THE COURT: Counsel, let's go into the facts now, counsel. You argue your facts.

MR. MISSIRLIAN: Up to that time she had glimpses [92] of the man who attacked her. She again testified that when she left the room the man was at her side. They proceeded through the lightened room into a dark alley.

Now certainly the defendant here, Ben Browder, was in the lineup with a bandage on his hand and an earring. The opportunity for Miss Johnson to observe was not that great amount of time. She was frightened, as she testified. The only thing she clearly remembered was that the man had a bandage and an earring and when the defendant was in the lineup he was the only person with a bandage and an earring.

We would ask this Court to suppress the identification and including the lineup and the in court based on the suggestiveness of the police officers in conducting this lineup. They certainly elicited this identification.

They had the police reports before them. Some police officers had talked to Miss Johnson and they knew the man that attacked her had a bandage. Certainly we are not required to have five men or six men with bandaged hands and earrings in the lineup but I think the police are at least required to have Mr. Browder remove his bandage to make it a fair lineup because barring the bandage on the hand and the earring [93] I believe that Miss Johnson would not have been able to identify anyone in that lineup.

THE COURT: Mr. Driscoll.

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[95] MR. DRISCOLL: The Court should therefore find that the facts are that the out of court identification and the lineup were proper and that the Court should deny this motion because petitioner-defendant has not met his burden of proof of showing that it was coerced in any manner.

THE COURT: Mr. Missirlian, anything further?

MR. MISSIRLIAN: No.

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[97] (Proceedings of August 24, 1971)

THE COURT: There were two motions, two motions that were filed that the Court would be prepared to rule on now.

First was the motion to suppress statements and in that connection the evidence heard on this motion to suppress statement would support in the Court's mind only one conclusion and that is that the so-called [98] Miranda warnings or rights were given on two separate occasions, each time before statements were made, that with indications that the defendant understood these warnings as given.

The Court has heard no evidence whatsoever during the course of that hearing of any mental coercion or duress of any kind and accordingly defendant's motion to suppress statements is denied.

After reviewing carefully the evidence on the motion to suppress identification and reviewing the exhibit which was introduced during that motion this Court is not prepared to say that the lineup in the instant case and under the circumstances of this case was improper or unusually suggestive. But apart from the lineup I believe that the totality of the evidence including the sincere and positive and straight forward testimony of the victim clearly established that the victim here and under all the circumstances of this case and this occasion had ample opportunity to observe, to note and to remember her assailant, apart and unaffected by any subsequent lineup identification.

She had ample time and opportunity to observe her attacker when she first noticed him in the alley and he first came up behind her and in the darkened [99] room when her eyes became accustomed to the lighting conditions or to that particular room and the lighted room as they left and in the alley and on the street after leaving the basement.

She was able to describe her attacker quite accurately to the police after the attack and further and importantly her identification was not dependent solely on the normal visual observations but also involved a reliance on a voice of the defendant as well as certain uncommon characteristics such as a bandage or cast and the small gold earring.

Under all of these circumstances, under the totality of the evidence defense's motion to suppress identification is denied.

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(Proceedings of August 26, 1971)

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[113] THE COURT: Good morning, ladies and gentlemen. Be [114] seated, ladies and gentlemen. I think we are ready to proceed. Ladies and gentlemen, at this time the State's Attorney will make an opening statement, during which time he will tell you what he expects to prove and the defendant's attorney may respond.

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(Prosecution's opening statement, Tr. 114–117, omitted)

[117] OPENING STATEMENT ON BEHALF OF THE DEFENDANT

By MR. MISSIRLIAN:

Ladies and gentlemen of the jury:

[117] In this case, there are two critical elements that the State must prove to you from the witness stand from the witnesses who will testify. One of which is the identification testimony of the young lady, Johnnie Mae Johnson. This identification testimony came after a lineup in which she will identify the defendant Ben Browder. Now, we will show to you that the lineup that was conducted by the police department was totally unfair and highly suggestive.

The second piece of evidence that the State will introduce is a statement, an alleged oral statement, made by the defendant Ben Browder to policemen. Now, this statement comes as the evidence will show after the defendant, in the company of civilians, protested his innocence. But the police department elicited an oral statement, not a written statement, after he is in police custody and when the only witnesses are police witnesses.

Now, when he is with his family, when he is with his friends, when he is with civilians, he protested his innocence. But the police come up with a statement after he is in custody.

I think after all the evidence is in, these [118] two factors will remain in your mind, whether it be the identification procedure was unfair and whether she could have identified anybody at that lineup other than Ben Browder; and, secondly, whether the alleged oral statement is truthful and in fact, did it ever occur.

Thank you.

THE COURT: All right. Will the State call its first witness, please?

MR. SALAS: Yes, your Honor. At this time, the State will call Miss Johnnie Mae Johnson to the stand.

(Testimony of Johnnie Mae Johnson, Tr. 119–150, omitted)

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[150] THE COURT: The People may call its next witness.

MR. DRISCOLL: Detective Conroy.

[151] DIRECT EXAMINATION

By MR. DRISCOLL:

Q. State your full name, sir, and spell the last name for the Court Reporter, please?

A. Youth Officer Martin Conroy, Area 4 Youth, C-o-n-r-o-y.

Q. What is your business or occupation, sir?

A. Police officer with the Chicago Police Department.

Q. How long have you been employed as a police officer?

A. Just over five years.

Q. And how long have you been assigned to your present assignment?

A. Since May of '69.

Q. Calling your attention to January 31, 1971, were you so assigned and employed on that day?

A. Yes, sir, I was.

Q. Were you working alone or with a partner on that day, sir?

A. I was assigned with a partner.

[152] Q. Would you tell the ladies and gentlemen of the jury his name?

A. Frank O'Driscoll.

Q. Where is he today?

A. Today he is injured on duty or sick. He is not at work today.

Q. Now, calling your attention to January 31, 1971, did you have an occasion to receive an assignment?

A. Yes, sir, I did.

Q. What type of assignment did you receive?

A. Investigation of a rape.

Q. Tell the ladies and gentlemen of the jury and the Court where if anywhere you went in response to your assignment?

A. I went to the address of 4053 West Monroe.

Q. Do you know who lived there?

A. Yes, sir.

Q. Will you tell the ladies and gentlemen of the jury who lived there?

A. Ben Earl Browder.

Q. Will you look around the courtroom today, Officer Conroy, and see if you see anyone in court by that name?

[155] A. The fellow in the green shirt sitting next to the attorney. (Indicating.)

MR. DRISCOLL: Indicating for the record the defendant Ben Earl Browder.

Q. Did you go alone or with another officer?

A. I had the assistance of three other officers.

Q. Will you tell the ladies and gentlemen of the jury their names?

A. Youth Officer O'Driscoll, Youth Officer Touhey and Youth Officer Ahern.

Q. Were you working in uniform or in plainclothes?

A. Plainclothes.

Q. Tell the ladies and gentlemen what time you got to that location on Monroe Street?

A. I got there approximately six o'clock in the evening on the 31st.

Q. Did you have occasion to see Ben Earl Browder at that time?

A. Yes, I did.

Q. Was he placed under arrest at that location?

A. Yes, sir, he was.

Q. As to what charge was he placed under arrest?

A. Investigation of rape.

[154] Q. Will you tell the ladies and gentlemen of the jury where if anywhere he was taken?

A. We took him directly to the 11th District police station at 4001 West Fillmore.

Q. Now, the area of 4000 block on Monroe and 4100 block on Adam, is that in your Area 4?

A. Yes, sir, it is, in the 11th Fillmore District.

Q. The 11th District is included in Area4?

A. Yes, sir.

Q. How far is the 4053 West Monroe address from the area of 4148 West Adam?

A. About one block across the alley.

Q. Now, where if anywhere was the defendant taken?

A. We took him to the 11th District.
Q. Where is the 11th District located, sir?
A. 4001 West Fillmore.
Q. What time approximately did you get to the 11th District?
A. I'll say about 6:15 that afternoon, about 15 minutes after the arrest.
Q. What if anything occurred after you got to the 11th District, sir?
A. We conducted a showup with four other gentlemen
[155] ting his general description.
Q. How many people all told were in this lineup?
A. There were five in the lineup.
Q. Where and what part of this station did this lineup occur?
A. On the second floor.
Q. Now, what police officers were present during the time of this lineup?
A. The three that assisted me, Ahern, O'Driscoll and Touhey and myself.
Q. Did you have an occasion to see a young lady at the police station?
A. Yes, sir.
Q. Did you later ascertain her name?
A. Yes, sir, I did.
Q. Tell the ladies and gentlemen of the jury what name you ascertained?
A. She gave her name as Johnnie Mae Johnson.
Q. Did you ever see her in the presence of the defendant Ben Browder at the police station?
A. Yes, sir.
Q. And did she have an occasion to view this lineup?
A. Yes, she did.
Q. Did you say anything to her prior to viewing this
[156] lineup?
A. Yes, sir. I told her we had a suspect in custody and I wanted her to view a group of five, who might possibly be in the lineup.
Q. Did you tell her who to pick out?
A. No, sir.
Q. Did you tell her that Ben Browder was going to be in the lineup?
A. No, sir, I did not.

Q. Can you describe in general the five people in the lineup, general height and the like?
A. Three of them were male Negroes, in their— about 17, 18, 19, about five-seven to five-nine and two of them were about five-eleven, maybe five-nine or six foot.
Q. Now, was this lineup photographed?
A. Yes, sir, it was.
Q. Officer Conroy, I will show you what has been previously marked as People's Exhibit 1 for identification purporting to be a photograph of five men in a lineup and ask you to examine that, please.
Can you identify that photograph?
A. Yes, sir.
[157] Q. Would you do so for the ladies and gentlemen of the jury, please?
A. This is the order in which the five suspects stood at the showup.
Q. Do you see anyone portrayed in that photograph who is present here in court today?
A. Yes, sir.
Q. Would you point out whom, if anyone, in the photograph is present in court today?
A. Ben Browder is standing here in the center of the showup.
Q. What if anything is he wearing in that photograph?
A. Wearing a white knit, looks like a stocking cap, and a corduroy coat.

MR. MISSIRLIAN: I object. If the officer wants to refresh his recollection—
THE COURT: I think the picture speaks for itself.
MR. DRISCOLL: All right, fine.

Q. Would you tell the ladies and gentlemen of the jury how the lineup took place and in what manner it was conducted?
A. One of my partners, Officer Ahern, conducted the lineup where he had each, starting with the one [158] on the left, give his name, his address and his place of employment and they went down the line one at a time with that. And he had them face front and he had them face to the side and they each repeated a phrase that the suspect offender was supposed to have uttered before the rape, "Don't look at me."

Q. Did each of there people do this in the presence of Johnnie Mae Johnson?

A. Yes, sir.

Q. Did she later make an identification?

A. She did.

Q. Did she have an occasion to leave after she made her identification?

A. Yes, sir.

Q. Did she leave the room in which the lineup was held?

A. Yes, sir, she did.

Q. Did you stay in that room after the lineup was conducted?

A. Yes.

Q. Will you tell the Court what if anything happened after the lineup?

A. After being identified by Miss Johnson, Ben [159] Browder called me off to the side and he said he wanted to tell me something.

Q. What specifically did he tell you?

A. He said that he did in fact rape Johnnie Mae Johnson.

Q. Where did this conversation take place?

A. It took place in one of the offices in the front of the second floor, building.

Q. Who was present, if you recall?

A. My partner, Frank O'Driscoll.

Q. Who else?

A. Ben Browder and myself.

Q. Approximately what time did this conversation take place, approximately?

A. After the showup, I think maybe about a quarter to seven, eight o'clock, I really don't know.

Q. Will you tell the ladies and gentlemen of the jury specifically what was said in that room by yourself and by the defendant, Ben Browder?

A. Ben Browder told me that he did rape Johnnie Mae Johnson. I said, "Now, wait a minute". I informed him of his constitutional rights.

Q. What specifically did you tell him?

[160] A. I told him that he had the right to remain silent and he had the right to an attorney to be present before he made any statement and if he could not afford an attorney, one would be provided free of charge to be present

before he made any statement and that anything he said would be used in evidence against him.

Q. Now, did you ever advise him of his rights prior to that time?

A. Yes, sir, I did.

Q. When did that take place?

A. At his home before we took him to the station.

Q. Who was present in general at that time?

A. His mother, his brother and two other fellows.

Q. Now, after you interrupted and advised the defendant of his rights, what if anything did he say?

A. And he said he did rape Johnnie Mae Johnson. And I asked him if he forced her in any deviate sexual act and he said no. I said, "Did you have a gun? She said you had a gun." And he said no, he did not.

Q. How long did this conversation last?

A. Couple minutes because right afterward, I informed the investigator that he had made an admission.

Q. What investigator did you inform?

[161] A. Investigator Thomas, Area 4 Homicide, and his partner.

Q. Now, did you have occasion to see the defendant again?

A. Yes, sir.

Q. Where did you see him again?

A. In another kind of like an anteroom up there. This is a small room off to the side.

Q. Who was present at that time, if anyone?

A. Frank O'Driscoll, myself, Investigator Thomas and his partner and a couple of other officers. I don't know if they were all in there.

Q. Now, did you have occasion to hear the defendant speak?

A. Yes, sir.

Q. What did he say?

A. He admitted having raped Johnnie Mae Johnson.

Q. Specifically what did he say, if you recall?

A. I don't recall exactly what he said.

Q. How long did this conversation last?

A. Couple of minutes.

Q. After that, where if anywhere was the defendant taken from that room?

[162] A. Right downstairs to the lockup where he was processed.

Q. Were any of his clothing, defendant's clothing, ever inventoried?
A. No, sir, not that I know of.
Q. Was there a gun ever recovered?
A. No, sir.

MR. DRISCOLL: May I have a moment, your Honor?
THE COURT: Surely.

(Brief pause in proceedings.)

MR. DRISCOLL: A few more questions, Officer Conroy.

Q. How much time elapsed between the first statement made by the defendant and the second statement made by the defendant?
A. Couple of minutes.
Q. Did everything that you testified to occur in the City of Chicago, County of Cook and State of Illinois?
A. Yes, sir.

THE COURT: You may cross, Mr. Missirlian. Mr. Missirlian, you may cross.
MR. MISSIRLIAN: That is all?
[163] MR. DRISCOLL: Yes, that's all.

CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer Conroy, you went to the Browder residence on the 31st of January, is that correct?
A. Yes, sir.
Q. At that time, you arrested the defendant Ben Browder?
A. Yes, sir.
Q. On the charge of investigation for rape?
A. Yes, sir.
Q. At that time, you informed him of his rights?
A. I did.
Q. At that time didn't he deny any knowledge of the rape?
A. Yes, sir, at that time he did.
Q. At that time, did you arrest anybody else?
A. Yes, sir.
Q. How many people did you arrest?
A. Three men.
Q. Do you know their names?

A. Tyrone Browder, his brother, and two other young fellows that were in the home.
[164] Q. These men were also in the lineup?
A. Yes, sir.
Q. After you arrested them, did you put handcuffs on them?
A. No, sir.
Q. Did you search him?
A. Yes, sir.
Q. At the time he was searched, did you recover a revolver?
A. No, sir.
Q. Did you recover a watch or any U.S. currency?
A. I don't recall, no, sir.
Q. What charge did you arrest the other three individuals on?
A. Investigation of rape.
Q. When they were taken down to the police station, were any of them handcuffed?
A. No, sir.
Q. Was there anybody else taken down to the station besides these four individuals?
A. No, sir.
Q. Did they voluntarily go with you to the police station?
[165] A. Yes, sir, they did.
Q. Who else was present with these four gentlemen in the apartment when you went in?
A. Mrs. Browder and couple of other kids in the house, I don't know, couple of young ladies and some children.
Q. And they were present when you advised Mr. Browder and his friends of their rights?
A. Yes, sir.
Q. And they were present also when Mr. Browder made a denial in his apartment?
A. Yes, sir.
Q. Now, when you took the statement in the police station, the first statement, your partner O'Driscoll was with you?
A. Yes, sir.
Q. Was there anybody else in the office at that time?
A. Well, we were still in the main hall when he called me and he said he wanted to make a statement and we went to

the front office where O'Driscoll accompanied me and Browder.

Q. Now, at that time was the defendant handcuffed?

[166] A. No, sir.

Q. Now, after he made this statement, did you ask him if he wanted to put it in writing?

A. No, sir, I did not.

Q. Did you call a court reporter or a stenographer to take this statement in writing?

A. No. I called the Homicide Investigator.

Q. Do you know if Mr. Browder was again searched at the police station?

A. No, sir, I don't know.

Q. When he was taken down to the lockup, do you know if he was searched at that time?

A. No, sir, I don't.

Q. Well, prior to placing him in this lineup, was he searched?

A. Yes, sir, when we left the house.

Q. This is the only time you searched him?

A. Yes, sir.

Q. Do you know if any other officer searched him?

A. No, sir, I don't.

Q. Up to this time, Officer, had you recovered any of the items that Miss Johnson said she lost in that alleged robbery and rape?

[167] A. I did not recover any, no, sir.

Q. Now, the clothes that Mr. Browder was wearing at the time of his arrest, was this taken from him and inventoried?

A. I don't know, sir. I didn't.

Q. Well, Officer, is this the first sex case you have ever handled?

A. No, sir.

Q. And isn't it customary——

MR. DRISCOLL: Objection to form.

THE COURT: I am going to sustain the objection.

MR. MISSIRLIAN: Q. Well, to your knowledge, was the underclothing taken?

A. I don't know.

Q. Then as you sit there, you don't know if anything was taken from Mr. Browder as to his clothes?

A. After my cursory search, I don't know if he was searched again.

Q. Was any of his clothing to your knowledge sent to the Crime Laboratory?

A. I don't know, sir.

MR. MISSIRLIAN: That's all.

[168] THE COURT: Any redirect?

MR. DRISCOLL: Yes.

REDIRECT EXAMINATION

By MR. DRISCOLL:

Q. Officer Conroy, when you arrested the defendant, you said you searched his person?

A. Yes, sir.

Q. What were you searching for?

A. Weapons.

Q. Did you have a search warrant to search his home?

A. No, sir.

Q. Was his home searched?

A. No, sir.

Q. After the lineup in which the defendant was identified, what if anything was done to the other three people that were arrested in the same investigation at the time of the defendant?

A. They were released.

Q. Included in that was the defendant's brother Tyrone?

A. Yes, sir.

Q. Besides the defendant and his brother, did any other members of his family go to the police station [169] with you?

A. No, sir.

Q. Did you advise the defendant of what he was being arrested for?

A. Yes, sir.

Q. Did you tell his mother? Did you speak to his mother at the home?

A. Yes, sir, I did.

Q. What if anything did you say to her in the home?

A. I told her that we had an investigation of an assault on a girl, that one of her sons was involved.

Q. And was she present at the time the defendant was placed under arrest?

A. Yes, she was.
Q. Was she present when the defendant was taken from the house?
A. Yes, sir.
Q. Did you tell her where the defendant was being taken?
A. Yes, sir, I did.
Q. Did she seek to accompany you?
A. No, not to my knowledge. I don't recall if she wanted to go or not.

[170] MR. DRISCOLL: That's all. Thank you.

THE COURT: Any recross?
MR. MISSIRLIAN: A few questions.

RECROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer Conroy, when you were in the home, you searched the parties that you took down to the police station, did you not?
A. Yes, sir, I did.
Q. Did you ask Mrs. Browder if you could search her home?
A. No, sir, I did not.
Q. Do you know if any other officer asked if they could search the home?
A. I don't think they did.
Q. While you were advising the defendant or the people that were there that you took down to the police station of their rights, weren't there officers going through the home, walking to different parts?
A. Well, yes, sir, there were quite a few people in the building.
Q. Did any one of the four defendants or the Browder brothers tell you that you could search the home?
[171] A. No, sir.
Q. You never asked to search the home?
A. No, sir.
Q. When you went to the Browder residence, you knew Ben Browder would be there, am I correct?
A. Yes, sir. I called him at home before we left.
Q. You had talked to Mrs. Browder?
A. Yes, sir.

Q. You knew though the gentlemen would be waiting for you when you arrived?
A. Yes, sir.

MR. MISSIRLIAN: That's all.

MR. DRISCOLL: That is all. Thank you.

THE COURT: You may step down. Thank you very much.
(Witness excused.)

MR. DRISCOLL: The People would call Officer Ahern.

DIRECT EXAMINATION

By MR. DRISCOLL:

Q. State your full name, sir, and spell the last name?
A. Officer Chris Ahern, A-h-e-r-n, Chicago Police [172] Department.
Q. You are a police officer?
A. Yes, I am.
Q. Where are you presently assigned?
A. I am presently assigned to the 10th District.
Q. Where were you assigned in the month of January, 1971?
A. Area 4 Youth Division.
Q. Now, calling your attention to January 31st, 1971, how long were you a police officer at that time?
A. About eight and a half years.
Q. On that day, were you working alone or with a partner?
A. I was working with a partner.
Q. What is his name?
A. John Touhey.
Q. On that day, did you have an occasion to go anywhere with any other officers from your Area?
A. Yes, I did.
Q. Will you tell the ladies and gentlemen of the jury where, if anywhere, you went?
A. We were assigned to a crime car to work in the 12th and 13th Districts but we were called to assist [173] the crime car that works the 10th and 11th Districts.
Q. Did that include Officer Conroy and O'Driscoll?
A. Yes, it does.
Q. Did you have occasion to go to the 4000 block on West Madison—West Monroe?

A. Yes, 4053 West Monroe.

Q. Did you see any other police officers when you got there?

A. Yes, Officer Conroy and Officer O'Driscoll.

Q. Did you have occasion to enter the address at 4053 West Monroe?

A. Yes, I did.

Q. Do you know who lived there?

A. Yes, I do.

Q. Who lived there to your knowledge?

A. The Browder family lived there.

Q. Will you look around the courtroom today, Officer Ahern, and see if you see anyone here in court that you saw on January 31 at 4053 West Monroe?

A. Yes, I do.

Q. Point out anyone you see.

A. The young fellow in the green short sleeved shirt, Ben Browder. (Indicating.)

[174] Q. Where was he when you first saw him?

A. He was in the living room of his home.

Q. Was he placed under arrest?

A. Yes, he was.

Q. Was he taken anywhere?

A. Yes, he was taken into the 11th Police District.

Q. Do you know how he got to the 11th District from his home?

A. Yes, he was transported in either Officer O'Driscoll's car or Conroy's or our car. There were four fellows that were taken into the station. Officer Touhey and myself took two. Officer O'Driscoll and Conroy took the other two.

Q. Will you tell the Court and the ladies and gentlemen of the jury what if anything you did when you got back to the 11th District relative to this case?

A. At the 11th District, I conducted a showup of five individuals.

Q. Where did this showup or lineup take place?

A. The showup took place in the second floor at the 11th District.

Q. Were any officers other than yourself present [175] at that time?

A. Yes, there were, Officer Conroy, Officer O'Driscoll and Officer Touhey.

Q. How was this lineup conducted, Officer Ahern, in what manner or in what method did you conduct it?

A. There were five people, individuals, approximately the same height, weight and age. They were lined up facing a wall. We had the victim of the crime come in, sit down, and had all the individuals turn together. Each individual, one at a time, starting from left to right took one pace forward, gave his name, his address and the words used in the commission of the crime.

Q. What words were used?

A. "Don't look at me."

Q. Did all the people in the lineup do this?

A. Yes, they did.

Q. Was this lineup photographed?

A. Yes, it was by the Evidence Technician of the Chicago Police Department.

Q. I show you what has been marked as People's Exhibit 1 for identification purporting to be a photograph of five men in a lineup and ask you to examine that, [176] please.

Can you identify that photograph?

A. Yes, I can. That's the photograph of the lineup taken at the 11th District that day.

Q. Look around the courtroom today, sir, and see if there is anyone here in court whose picture is portrayed in that lineup?

A. Yes, Ben Browder, the center individual in the photo.

Q. Is this a true and correct portrayal of the lineup as it appeared on January 31, 1971?

A. Yes, it is.

Q. Did a Johnnie Mae Johnson view this lineup?

A. Yes, she did.

Q. Did she make an identification?

A. Yes, she did.

Q. Did she leave after the identification was made?

A. Yes, she did. She went into an outer office at the 11th District.

Q. Were you present when any statements were made by the defendant?

A. No, I wasn't.

Q. Did you have an occasion to see the Homicide-Sex [177] Investigator from Area 4 at the station?

A. No, I didn't. I conducted the lineup and we had to go over to a——

MR. MISSIRLIAN: Objection.
THE COURT: Read the answer, Mr. Reporter.
(The answer was read by the Reporter.)
That answer is yes or no.

THE WITNESS: A. No.
MR. DRISCOLL: Q. Where if anywhere did you go after the lineup was conducted?
A. Officer Touhey and myself went to the 13th District on another case.
Q. Did everything you testified to occur in the City of Chicago, County of Cook and State of Illinois?
A. Yes, it did.

MR. DRISCOLL: Thank you. No further questions.
THE COURT: You may cross examine.
MR. MISSIRLIAN: All right, thank you.

CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer Ahern, you conducted the lineup?
A. Yes, I did.
Q. Do you remember approximately what time this [178] lineup was conducted?
A. Approximately 6:30.
Q. And at the time of the lineup, while Mr. Browder was in that lineup, wasn't he instructed to put on a white tam?
A. No, he wasn't.
Q. Was he wearing a white tam?
A. Yes, he was.
Q. And he voluntarily put on that white tam?
A. He was wearing the hat as the other individuals in the lineup all were.
Q. All of them?
A. No, not all of them. I believe there were three or four fellows wearing hats and he was wearing his.
Q. Were they all wearing white tams?
A. No.
Q. But Mr. Browder was the only person wearing a white tam?
A. I am not sure.
Q. How about an earring, did anybody else in that lineup have an earring on at the time?
A. Not that I know of.

[179] Q. You also conducted a voice identification, isn't that correct?
A. Yes, by having the individuals repeat the words in the commission.
Q. Did you take a photograph of the lineup or did someone else?
A. The Evidence Technician from the police department took the photograph.
Q. And was that after the identification was made or prior to that time?
A. It was after the identification.
Q. And after the identification was made, were all the individuals taken out of the room that were in the lineup?
A. Yes, they were taken to a side office.
Q. Now, you were at the Browder residence when Ben Browder and three other individuals were arrested for investigation of rape?
A. Yes, I was.
Q. You were there when Ben Browder was allegedly informed of his rights by Officer—by another officer there?
A. I did not hear the rights being given to them [180] but I was told that they were.
Q. Were you in the living room at that time?
A. I believe I was in the hallway leading to the living room.
Q. Did you ever ask to search that apartment?
A. No.
Q. Do you know if any other police officers ever asked if they could search the apartment?
A. No, I don't.
Q. And when Mr. Browder and the other young boys were taken to the police station, were they handcuffed?
A. No, they were not.
Q. Did they voluntarily go with you to the police station?
A. Yes, they did.
Q. At the time Mr. Browder was in his home and the arrest was being made and the search of his person, did you hear Mr. Browder deny any knowledge of the rape and robbery?
A. No, I did not.
Q. How was Mr. Browder dressed when you arrived at the apartment, if you remember?

A. I don't recall. I think he was in a shirt and [181] trousers is all.

MR. MISSIRLIAN: That's all.
THE COURT: Any redirect?
MR. DRISCOLL: No. Thank you.
THE COURT: You may step down. Thank you very much.

(Witness excused.)

MR. DRISCOLL: Judge, we can continue or do you want to break for lunch?
THE COURT: Go ahead.
MR. DRISCOLL: All right. We will call Officer Touhey.* * *

DIRECT EXAMINATION

By MR. DRISCOLL:

Q. State your full name, sir, and spell your last name?
A. John Touhey, T-o-u-h-e-y.
Q. What is your business or occupation, sir?
A. I am a Chicago Police Officer assigned to Area 4 Youth Division.
[182] Q. How long have you been employed as a police officer?
A. Seven years.
Q. How long have you been assigned to Area 4?
A. Three years.
Q. Were you so assigned and employed on January 31st, 1971?
A. Yes.
Q. Calling your attention to that day, were you working in uniform or in plainclothes?
A. I was working in plainclothes.
Q. Does the area of your Area known as Area 4, does that over the vicinity of 4100 West Adam and 4000 West Monroe?
A. Yes, it does.
Q. Were you working alone or with a partner on January 31?
A. I was working with a partner.
Q. What is his name?
A. Christopher Ahern.
Q. Did you have occasion to go anywhere on that day with him?

A. Yes, I did.
[183] Q. Where if anywhere did you go?
A. We went to 4053 West Monroe.
Q. What type of assignment did you go there for?
A. We were an assist with another team to go there on a rape investigation.
Q. What police officers did you observe when you got to that location?
A. Officer O'Driscoll and Officer Conroy.
Q. Did you have occasion to enter 4053 West Monroe Street?
A. Yes, I did.
Q. Did you ascertain who lived at that location?
A. Yes, I did.
Q. And do you know who lived there, the name of the party?
A. Yes, the Browder family.
Q. Will you look around the courtroom today, Officer Touhey, and see if you see anyone here in court that you saw at the Browder home on January 31?
A. The gentleman in the green shirt was in the home. (Indicating.)
MR. DRISCOLL: Indicating for the record the defendant Ben Browder.
[184] Q. Was he placed under arrest?
A. Yes, he was.
Q. Were there other people placed under arrest with him?
A. Yes, there were.
Q. Where if anywhere were these people taken?
A. They were taken to the 11th Police District.
Q. Will you tell the Court what if anything you observed and the ladies and gentlemen of the jury at the 11th District?
A. I observed a lineup procedure at the 11th District.
Q. Who conducted the lineup?
A. Officer Ahern conducted that lineup.
Q. Were there any other officers present?
A. Yes, Officers Conroy and O'Driscoll were also present.
Q. How many people were in that lineup?
A. Five people.
Q. Were any of the people that were arrested at the Monroe Street at this lineup?
A. Yes.

Q. How many?

A. Four people from Monroe Street were in that lineup.

[185] Q. Did Johnnie Mae Johnson view that lineup?

A. Yes, she did.

Q. Did she make an identification?

A. Yes, she did.

Q. Will you tell the Court and the ladies and gentlemen of the jury what if anything you observed her doing after the identification was made?

A. She left the squadroom.

Q. Were you in the room after she left?

A. Yes, I was.

Q. Was anyone else, any of the people in the lineup still in the room?

A. Yes, they were all in the room immediately after the lineup.

Q. Tell the ladies and gentlemen of the jury what if anything you observed after Johnnie Mae Johnson left the room?

A. Well, after Johnnie Mae Johnson left the room, we brought the people, the five individuals back over to the outer office and as we approached the outer office, the defendant in the green shirt, Mr. Browder, approached Officer Conroy who was standing next to him and asked him whether he could talk to him.

[186] Q. What if anything happened at that time?

A. Well, Officer Conroy and the defendant went into an adjoining office with Officer Driscoll, his partner, went in the office with them.

Q. Did you go into that office?

A. No, I didn't.

Q. Were you present during any statement that the defendant may have made at the station?

A. No, I wasn't.

Q. Where if anywhere or what if anything did you do after you saw the defendant go into that office with the two officers that you have named?

A. Well, I went back—I was talking to the other individuals that were involved in the lineup, the other three individuals, other four individuals.

Q. Were the other people arrested with Ben Browder released after his lineup?

A. Yes, they were released after the processing procedure.

Q. Now, sir, I will show you what has been marked as People's Exhibit 1 for identification purporting to be a photograph of five men in a lineup and ask you to examine that please.

[187] Can you identify that photograph, Officer?

A. Yes, I can.

Q. Would you do so for the ladies and gentlemen of the jury?

A. This is the lineup of the five gentlemen. The picture was taken at the Police District, the 11th District.

Q. Is this a true and correct portrayal of the lineup as you observed it on January 31, 1971, at the 11th District?

A. Yes.

Q. Do you see anyone in court whose picture is in the lineup photograph?

A. Yes, the defendant, Mr. Browder.

Q. Is that a true and correct portrayal of the defendant as you saw him on that day?

A. Yes, it is.

Q. Thank you. Officer Touhey, did all the testimony that you gave in court today, did everything occur in the City of Chicago, County of Cook and State of Illinois?

A. Yes, it did.

MR. DRISCOLL: Thank you very much. No further questions.

[188] THE COURT: You may cross examine.

CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer Touhey, when you went to the Browder residence, did you go into any of the—did you go into the apartment?

A. Yes, I did.

Q. How many rooms of that apartment did you go into?

A. I was in the living room and I was in the kitchen which is the back room.

Q. Did you ask anyone at that time if you could search the apartment?

A. No, I didn't.

Q. Now, were you present when Mr. Browder and the

other gentlemen at the apartment were informed of their rights?

A. Yes, I was.

Q. You were?

A. Yes, sir.

Q. Who informed them of their rights?

A. Officer Conroy.

Q. And at that time, did you hear the defendant say that he had no knowledge of a rape and that he [189] would accompany the police to the station?

A. No. He had no knowledge. I believe he said he had no knowledge of the rape but he said he would not accompany us.

Q. He said he would not?

A. That's correct.

Q. Well, was he handcuffed and led out of that apartment?

A. No, he wasn't. He was led out of the apartment. He was not handcuffed.

Q. How about the other boys, were they handcuffed and led out?

A. No, they were not.

Q. None of them went voluntarily to the police station?

MR. DRISCOLL: Objection. That is a conclusion.

THE COURT: Sustained.

MR. MISSIRLIAN: Q. Now, you testified that you were present when after the lineup, the defendant approached Officer Conroy and asked if he could talk to him?

A. That is correct.

Q. And who else was present when the defendant [190] allegedly approached Officer Conroy?

A. As I recall, Officer Conroy and I were standing together. We were the only ones in that immediate area.

Q. Was Officer O'Driscoll there?

A. He was present in the squad room but I don't know what relationship he was to us. I don't know how close he was.

Q. You didn't go with Officer Conroy into the room where this statement was allegedly had?

A. No, I didn't.

Q. You said the other people in the lineup were released?

A. That's correct.

Q. All three of them or all four of them, the three other individuals in the lineup were released?

A. There were three released.

Q. Three released. And they were processed first, is that correct?

A. That is correct, before we released them.

Q. When you say processed, what do you mean?

A. Well, there are arrest slips made out and then they are processed through the identification section [191] to make sure that they are not wanted for something and then they are released by the signature of the Commanding Officer of that district.

Q. Were they fingerprinted and photographs taken at that time?

A. Whatever the processing procedure is. I am not that familiar with fingerprinting and that end of it.

Q. Now, when you entered that apartment, Browder residence, on the 31st, do you remember how Ben Browder was dressed?

A. At the time, I don't recall what he was wearing in the apartment. I don't recall.

Q. Well, do you remember if anybody in that lineup other than Mr. Browder was wearing an earring?

A. I don't recall.

Q. How about a white tam, was there anybody in that lineup besides Mr. Browder wearing a white tam?

A. There was—you mean in the apartment or at the station?

Q. At the station?

A. In the station, no, there was nobody else in a white tam that I remember.

Q. While the lineup was being conducted, was Mr. [192] Browder instructed to put on that white tam, if you remember?

A. I don't really recall that.

Q. Now, when you entered the Browder residence on the 31st [illegible] you or any other police officer with you have an arre[illegible]rrant?

A. [illegible], we di[illegible]'t.

Q. Did you or any other police officer at that time have a search warrant?

A. No, we didn't.

Q. Did you search the defendant Mr. Browder or did some other officer?

A. I did not search the defendant.

Q. Did you search anybody in that apartment?

A. No, I didn't search anybody.

Q. Did you enter any other room besides the living room and kitchen?

A. No, they were the only two rooms that I was in.

Q. Do you remember if any other police officers entered other rooms?

A. No, not that I recall.

MR. MISSIRLIAN: That's all.

THE COURT: Any redirect?

[195] REDIRECT EXAMINATION

By MR. DRISCOLL:

Q. Officer Touhey, were the people in the lineup given clothing at the station to put on at that lineup or did they wear the clothes they had on in the lineup?

A. They brought the clothes in. I believe they brought —they were wearing the same clothes they were wearing at the police station and they put on coats and hats. There was no clothing distributed at the lineup.

Q. Ben Browder, he was wearing the clothing he had on at the apartment in the lineup, is that correct?

A. That's correct.

MR. DRISCOLL: May I have a moment?

THE COURT: Yes, you may.

(Brief pause in proceedings.)

MR. DRISCOLL: Q. One last question, Officer Touhey. Were any other people in the lineup other than this defendant, Mr. Browder, wearing a hat if you recall?

A. I don't believe so. I think Mr. Browder was the only one wearing a hat.

MR. DRISCOLL: Thank you. That is all.

THE COURT: Any additional cross, Mr. Missirlian?

[194] RECROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Just one question, Officer. Officer Touhey, while you

were in the apartment, did you hear any police officer instruct Mr. Browder or any of the other individuals to take certain articles of clothing?

A. No, I don't recall any.

MR. MISSIRLIAN: That is all.

MR. DRISCOLL: Nothing further.

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[196] MR. SALAS: Yes, At this time the People will call to the stand Investigator Stan Thomas.

DIRECT EXAMINATION

By MR. SALAS:

Q. Will you state your full name and spell the last name, sir?

A. Investigator Stan Thomas, T-h-o-m-a-s, Star No. 9737 assigned to Area 4 Homicide.

Q. Who do you work for, Investigator?

A. Chicago Police Department.

Q. How long have you been employed with the City of Chicago Police Department?

A. Nine years.

Q. Were you so employed on January 31, 1971?

A. Yes.

Q. Directing your attention to that day, Officer, that is January 31, 1971, did you have an occasion to have an assignment?

A. Yes.

Q. How was that assignment communicated to you?

[197] A. I was assigned by the Area Watch Commander to proceed to the Cook County Hospital in reference to a rape investigation.

Q. After you proceeded to the Cook County Hospital, did you have occasion to have a conversation with anyone?

A. I would like to clarify the last statement I made. I had been sent to the 11th District with reference to a subject in custody for rape.

Q. Thank you. Proceeding to the 11th District, did you have occasion to meet any officers there?

A. Yes.

Q. Where is the 11th District police station located?

A. At Fillmore and Pulaski.

Q. What officers did you meet when you arrived there?
A. Youth Officer Conroy, O'Driscoll and two others. I think one is Ahern and Touhey, I believe.
Q. Did you have occasion to have a conversation with them at this time?
A. Yes.
Q. After your conversation with those officers, what did you do then?
A. I spoke to the defendant.
[198] Q. The person who you spoke to present in this courtroom today?
A. Yes, he is.
Q. Would you indicate to the ladies and gentlemen of the jury which person he is?
A. The person sitting to the right of counsel there. (Indicating.)

MR. SALAS: Indicating for the record the defendant, Ben E. Browder.

Q. Did you at that time have an occasion to have a conversation with Mr. Browder?
A. Yes.
Q. Prior to that, who was present at that conversation?
A. Youth Officers Conroy and O'Driscoll.
Q. Approximately what time was that, Officer?
A. Approximately 6:30 in the evening.
Q. Where in the 11th District did this conversation take place?
A. On the second floor of that station.
Q. Prior to propounding any questions to the defendant, did you have occasion to make certain statements to him?
A. I informed the defendant of his constitutional [199] rights.
Q. Specifically tell the ladies and gentlemen of the jury what you told the defendant?
A. One, I told him that he had the right to remain silent, that anything he stated to me can be used later in a court of law. Two, that he has a right to an attorney to be present at all questioning, attorney of his own choosing and if he did not have the funds to afford an attorney, an attorney then would be appointed to him by the State and could be there present for any questioning.
Q. After you informed him, made a statement to the

defendant, did the defendant make any statements to you, Officer?
A. Yes, sir.
Q. What if anything did the defendant, Ben Browder, state to you?
A. He made an oral admission to the rape.
Q. What did he state specifically?
A. That he had raped Johnnie Mae Johnson.
Q. After the defendant admitted he raped Johnnie Mae Johnson, what if anything did you do after that?
[200] A. I then prepared the proper papers charging him with the rape and armed robbery.
Q. And did you make any further investigation into this case at that time?
A. No.
Q. Officer, directing your attention back to the time that you had this conversation with the defendant, Ben Earl Browder, would you tell the ladies and gentlemen of the jury, give what he was wearing at that time?
A. The subject had on a white tam. He had a cast on his right wrist and an earring on his left ear and he had dark jacket on and dark clothing he had on in general.
Q. Then finally, Officer, did everything you testified to, did all of this occur in the County of Cook and State of Illinois?
A. Yes.
MR. SALAS: No further questions? You may inquire.

THE COURT: Mr. Missirlian.

CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer Thomas, when Mr. Browder made this alleged [201] oral admission to you, what police officers were present?
A. My partner was present, Investigator Reininger, Youth Officer Conroy and Youth Officer O'Driscoll.
Q. Did you ask Mr. Browder if he wanted to make a written statement?
A. No, sir.
Q. When this statement was taken, was there a court reporter or a stenographer in the room?
A. No, sir.

Q. Other than police officers, was there anybody else in the room?
A. I don't recall.
Q. How long of a period of time did you see Mr. Browder?
A. Two to three minutes.
Q. Now, prior to coming to court today, had you seen photographs of the lineup?
A. Yes.
Q. And prior to coming here today, have you talked with the other officers on this matter?,
A. Yes, sir.

MR. MISSIRLIAN: That's all.

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(Proceedings of August 27, 1971)

[206] MR. SALAS: Yes, your Honor. At this time, your Honor, the People will call to the stand Doctor Farooq Nazir.

(Testimony of Dr. Nazir, Tr. 206-214, omitted)

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[216] MR. DRISCOLL: Your Honor, the People will call Officer Frank O'Driscoll.

DIRECT EXAMINATION

By MR. DRISCOLL:

[217] Q. Will you state your full name and spell the last name?
A. Yes, Officer Francis O'Driscoll, O-apostrophe-D-r-i-s-c-o-l-l-
Q. What is your business or occupation, sir?
A. Youth Officer assigned to Area 4 Youth.
Q. How long have you been a police officer for the City of Chicago?
A. 15 and a half years.
Q. How long have you been assigned to Area 4 Youth?
A. Two and a half years.
Q. Were you so assigned and employed on January 31, 1971?
A. Yes, I was.
Q. Calling your attention to that date, Officer, were you working alone or with a partner?

A. I was working with a partner.
Q. What is his name?
[218] A. Martin Conroy.
Q. Now, again directing your attention to the same date, did you have an occasion to receive an assignment?
A. Yes, we did.
Q. Did you have an occasion to go anywhere upon receipt of that assignment?
A. Yes, we did.
Q. Where if anywhere did you go?
A. 4053 West Monroe Street, first floor apartment, I believe it was.
Q. What type of assignment did you receive?
A. It was a rape investigation.
Q. Now, did you have an occasion to see anybody when you got to 4053 West Monroe Street?
A. Yes, I did.
Q. Look around the courtroom today, Officer, and see if you see anyone here in court who was present at 4053 West Monroe on January 31, 1971?
A. The gentleman at the table with the green shirt on.

MR. DRISCOLL: Indicating for the record, the defendant, Ben E. Browder.

[219] Q. Now, was Mr. Browder placed under arrest?
A. Yes.
Q. Where if anywhere was he taken after being placed under arrest?
A. To the 11th District, Fillmore Station, Fillmore and Pulaski.
Q. Did you have occasion to see him at that location?
A. Pardon me?
Q. Did you have occasion to see Mr. Browder at the 11th District?
A. Yes. I brought him in.
Q. Tell the Court and the ladies and gentlemen of the jury where you saw him at the 11th District?
A. On the second floor in the Youth Office, in the Sergeant's office.
Q. Was there a lineup held at the 11th District?
A. Yes, there was.
Q. Were you present during that lineup?
A. Yes, I was.

Q. Did you have occasion to see a young lady named Johnnie Mae Johnson?

A. Yes, I did.

Q. Did you see her in the presence of the defendant, [220] Ben E. Browder?

A. Yes, I did.

Q. This was at the time of the lineup?

A. Yes.

Q. What that lineup photographed?

A. I believe it was.

Q. Officer, I will show you what has been marked as People's Exhibit No. 1 for identification purporting to be a photograph of five men in a lineup and ask you to examine that, please.

After examining it, can you identify that?

A. Yes, that's a photograph that was taken that night.

Q. Is that a true and correct portrayal of the lineup as you observed it on January 31?

A. To the best of my knowledge, yes.

Q. Did Miss Johnson make an identification?

A. Yes, she did.

Q. Did she leave after viewing the lineup?

A. I believe she left shortly thereafter. I am not sure.

Q. Did you have an occasion to see Ben Browder after the lineup?

[221] A. Yes.

Q. Where did you see him after the lineup?

A. I seen him in the Sergeant's office. I seen him shortly thereafter back in the Youth Office again.

Q. Now, will you tell the ladies and gentlemen of the jury who was present, if anyone, when you saw the defendant in the Sergeant's office?

A. My partner, Officer Conroy.

Q. Was there a conversation at that time?

A. Yes. Officer Conroy, Mr. Browder and myself had a conversation.

Q. What if anything did the defendant say at that time?

A. He called us over and stated he wanted to tell us about the incident that took place and at that time Officer Conroy again gave him his rights and he stated he understood these and he said that he did not have a gun and he did not commit an act of oral copulation with the girl. He did have intercourse with her.

Q. Now, did you later see the defendant in another room?

A. Approximately 15 feet from there in the Youth [222] Office.

Q. Who was present at that time, if anyone?

A. Conroy, myself and I believe one of the other officers. I am not sure.

Q. Was Investigator Thomas present?

A. Thomas was there of the Homicide Unit.

Q. Did the defendant say anything at that time in the other room?

A. He stated again to Conroy and Thomas and myself what he had related over at the Sergeant's office.

Q. What was that that he said the second time?

A. That, well, he stated that he had had intercourse but he did not have oral copulation and he did not have a gun.

Q. After that, was the defendant charged and processed?

A. He was processed, yes, by Officer Thomas and his partner.

Q. Now, did the defendant use the word intercourse when he was telling you what happened?

MR. MISSIRLIAN: Your Honor, I am going to object.

THE COURT: I am going to sustain the objection. He has already testified as to the statement.

[223] MR. DRISCOLL: Did everything you testified to occur in the County of Cook and the State of Illinois?

A. Yes.

THE COURT: You may cross examine, Mr. Missirlian.

MR. MISSIRLIAN: Are you through?

MR. DRISCOLL: I'm sorry, I'm all done. Thank you.

CROSS EXAMINATION

By MR. MISSIRLIAN:

Q. Officer O'Driscoll, you were present when the defendant Mr. Browder was arrested, is that correct?

A. Yes, I was.

Q. When he was arrested were any other individuals arrested?

A. I believe there were four more.

Q. What were they charged with?

A. They were brought in for investigation and released.

Q. They were brought in for investigation, is that correct?

A. Right.
Q. And Mr. Browder was brought in for investigation?
A. Right.
Q. And at that time, were you present when Mr. [224] Browder denied any knowledge of a rape in his apartment?

MR. SALAS: Objection.
THE COURT: Well, I will sustain the objection to that particular form unless you are laying a foundation.

MR. MISSIRLIAN: Q. When you were in the apartment, did your partner, Officer Conroy, question Mr. Browder?
A. Yes, he did.
Q. Did he question the other individuals in the apartment?
A. Yes, he did.
Q. When he questioned Mr. Browder, did he inform him that he was under arrest for investigation of rape?
A. Yes.
Q. And at that time, did Mr. Browder deny any knowledge of a rape?
A. I am not sure but I think he did.
Q. Do you remember who was present in the apartment when this conversation took place?
A. The other four people, Mrs. Browder, I believe, the father or a male anyway, approximately six to eight people.
Q. Now, when this alleged statement was taken at that [225] police station, were there any other civilian witnesses to witness the statement?
A. Not to my knowledge. When the first statement was given, it was given in the presence of Conroy, myself and Mr. Browder.
Q. Did you, Officer O'Driscoll, ask if he wanted to make a written statement?
A. No.
Q. Did you ever ask a court reporter or a stenographer to come in and take a written statement?
A. No, I did not, no.
Q. When you left the Browder apartment, was Mr. Browder handcuffed?
A. To the best of my knowledge, I don't remember. I don't remember. I don't think he was.
Q. You don't remember?
A. I don't remember. Let's leave it that way.

MR. MISSIRLIAN: That is all.

THE COURT: Any redirect?
MR. DRISCOLL: One more. That's all. Thank you.
THE COURT: You may step down.
THE WITNESS: Thank you.

(Witness excused.)

(out of the presence of the jury)

[226] MR. DRISCOLL: At this point, we are going to rest. May we have a sidebar and offer the exhibit?
THE COURT: Yes.
MR. DRISCOLL: At the sidebar, your Honor, outside the hearing of the jury, I am offering prior to resting, People's Exhibit 1, the only exhibit that has been marked for identification by the People in this case.

MR. MISSIRLIAN: I would have an objection, waiving argument on it.
THE COURT: All right, it will be admitted and the identification mark will be stricken.
MR. MISSIRLIAN: For the record, I will make a motion for a directed finding at this time.
THE COURT: Without argument?
MR. MISSIRLIAN: Without argument.
THE COURT: Motion for a directed finding will be denied.
MR. MISSIRLIAN: We will be ready.

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Within the hearing of the jury:)

[228] MR. DRISCOLL: May I proceed, your Honor?
THE COURT: Yes, please do.
MR. DRISCOLL: May it please the Court and ladies and gentlemen of the jury, the People are about at this point to rest their case in chief and prior to doing so, the People are offering into evidence its Exhibit No. 1, previously marked for identification, the photograph of the lineup. We offer that in evidence at this time, your Honor.
THE COURT: People's Exhibit 1 for identification will be admitted into evidence and the identification mark will be stricken and it will be marked People's Exhibit 1 in evidence.
[229] MR. DRISCOLL: Also at this time, ladies and gentlemen, there will be a stipulation or an agreement between each side in this case, respectively, the People of the State

of Illinois through myself and Mr. Salas as Assistant State's Attorneys and the defendant in his own proper person, through his counsel, that the age of Ben E. Browder is now 18 years of age. So stipulated?

MR. MISSIRLIAN: So stipulated.

MR. DRISCOLL: With that, your Honor, with that stipulation, we would rest our case in chief.

THE COURT: Very well.

MR. DRISCOLL: Thank you, ladies and gentlemen.

MR. MISSIRLIAN: Your Honor, the Defense will be ready to proceed. We will call Mr. Browder to the stand.

DIRECT EXAMINATION

By MR. MISSIRLIAN:

[230] Q. Will you give us your name, Ben, and spell the last name for the court reporter, please?

A. Ben Earl Browder, B-r-o-w-d-e-r.

Q. How old are you, Ben?

A. 17—just turned 18.

Q. Where do you live?

A. 4053 West Monroe.

Q. Who do you live there with?

A. My mother.

Q. Do you have any brothers or sisters who live there with you?

A. Nine brothers and three sisters.

Q. Now, directing your attention to January 30th, 1971, Ben, did you rape and rob Johnnie Mae Johnson on that day?

A. No.

Q. Do you remember the first time you saw Johnnie Mae Johnson?

A. When she came in court—in the police station.

Q. Now, Ben, when you were at the police station on January 31, 1971, did you ever tell any police officers [231] that you raped Johnnie Mae Johnson?

A. No.

Q. Did you ever give any of these police officers any statements?

A. No.

MR. MISSIRLIAN: That's all.

CROSS EXAMINATION

By MR. DRISCOLL:

Q. Mr. Browder, you live at 4053 West Monroe Street, is that correct?

A. That's right.

Q. That's about a block from 4148 West Adam?

A. Two blocks.

Q. Two blocks. How long have you lived in the area of 4053 West Monroe?

A. About nine years.

Q. Now, you were arrested on January 31, weren't you?

A. Yes, sir.

Q. At your home?

A. Yes, sir.

Q. The police came there and arrested you for investigation of rape, isn't that right?

[232] A. No, sir. They didn't tell me that, about investigation for rape. They didn't tell me nothing.

Q. Four policemen came into your house, isn't that correct?

A. Yes, four policemen came over.

Q. The same four gentlemen that testified here in court, is that correct?

A. Yes, sir.

Q. They weren't wearing uniforms, were they?

A. They were in plainclothes.

Q. They took you to the police station, is that right?

A. Yes, sir.

Q. And you were placed in a lineup?

A. Yes, sir.

Q. And photographed, is that correct?

A. Yes, sir.

Q. Now, when you went to the police station, you put your outer clothing on and your hat, is that right?

A. Yes, sir.

Q. That was the clothing you were wearing in the lineup?

A. Yes, sir.

[233] Q. White tam?

A. Yes, sir.

Q. All right. You had an earring in your ear on that day, didn't you?

A. I had an earring on.

Q. You don't have it on now, do you?
A. No, sir, I don't have it on.
Q. You had it on you on January 30th, didn't you?
A. No, sir.
Q. You just put it on the 31st?
A. Yes, sir.
Q. You have a pierced ear, don't you, sir?
A. Yes, sir.
Q. You wear an earring in that ear, don't you?
A. Yes, sir.
Q. How long have you been wearing an earring in your ear?
A. About two years.
Q. On January 30th, 1971, you had a pierced ear, isn't that right?
A. Yes, sir.
Q. You had an earring——
A. No, sir.
[234] Q. —to go through the pierced ear?
A. No, sir, I didn't have an earring on January 30th.
Q. Do you remember that clearly?
A. Yes, sir.
Q. Did you have one on January 25th in your ear?
A. No, sir.
Q. How about the 28th?
A. No, sir.
Q. You had it on when you were arrested?
A. Yes, sir.
Q. Did you have it on the day after you were arrested?
A. No, sir.
Q. Where is your earring now?
A. Where is it now?
Q. Yes.
A. I left it downstairs.
Q. Now, on January 30th, your hand was in a bandage or some type of cast on your arm?
A. In a bandage, not no cast.
Q. A bandage? You had that bandage on January 30th, isn't that right?
A. Yes, sir.
[235] Q. You had it on the 31st on your arm?
A. Yes, sir.
Q. All right. Now, this bandage left your fingers free, didn't it, sir?

A. Yes, sir.
Q. Were your fingers covered by the bandage?
A. Yes, sir.
Q. Completely covered?
A. Yes, sir.
Q. Couldn't move your fingers at all?
A. Yes, sir.
Q. This is the way it was on January 31st?
A. Repeat that again.
Q. Was the bandage on your hand on January 31 when you were arrested?
A. Yes, sir.
Q. And it completely covered your fingers, is that right?
A. Yes, sir.
Q. Your fingers were not visible then with the bandage on?
A. I had went to the doctor that Friday.
Q. My question is, your fingers were not visible [236] on January 31st from the bandage, is that right?
A. Yes, sir.
Q. Mr. Browder, would you look at People's Exhibit No. 1 in evidence and see if you see yourself in that photograph?
A. Yes, sir.
Q. Where are you in that photograph?
A. In the center.
Q. Do you see anything on your right arm in that photograph?
A. Yes, sir.
Q. Do you see your fingers visible?
A. Yes, sir.
Q. And the bandage didn't cover your fingers on that day, did it?
A. Yes, it covered the fingers.
Q. Your fingers are visible, aren't they?
A. Yes, sir.
Q. So the bandage did not cover your fingers?
A. It come all the way down.

THE COURT: I think we ought to clarify the terminology a little bit.
MR. DRISCOLL: Judge, I will.

[237] Q. Mr. Browder, on January 31st and the 30th, were any of your fingers sticking out of the bandage?

A. No, sir. They were not sticking out then. The whole hand was covered.

Q. Your whole hand was covered when you were in the lineup?

A. No, sir, not then, about a week before then.

Q. So your whole fingers were not covered on the 30th?

A. No, sir.

Q. You are right handed, aren't you?

A. Yes, sir.

Q. Your right fingers on your—your fingers on your right hand were flexible and movable on January 30th?

A. Itwas movable.

Q. You were able to put your clothes on and everything?

A. With the left hand, yes.

Q. Where were you on January 30th at 5:45 p.m.?

A. At the house.

Q. Do you remember that clearly?

A. Yes, sir.

Q. All right, what time did you get to your house on January 30th before 5:45?

[238] A. I had left out, went to the store, came back then, left out with some more friends and came back in.

Q. Who was there with you around between 5:00 and 6:00 p.m. at your house?

A. My brother, my mother, my brother's girlfriend and one of my partners.

Q. Give the ladies and gentlemen of the jury these people's names, please, names of the people who were there? I'm talking about January 30th.

A. My mother, Lucille Browder, my brother, Tyrone Browder, brother's girlfriend, Sherry Fletcher, my brother's partner, Stanley Polk, and my partner, Milton Dale.

Q. Your partner?

A. Milton Dale, he was there.

Q. Did you leave your house on January 30th at any time?

A. Yes, sir.

Q. What time did you go out?

A. Went to the store about 5:00, came back.

Q. What time did you get back to your house?

A. About 5:15, 5:30.

Q. What store did you go to?

[239] A. On the corner of Monroe and Pulaski.

Q. Did you see anybody at that store?

A. Yes, yes, sir.

Q. Do you remember the names of the people that you saw?

A. No, sir.

Q. Did you buy anything there?

A. Yes, sir.

Q. You got back to your house between 5:15 and 5:30, is that right?

A. Yes, sir. Around 5:15. Left out about five minutes to.

Q. So when you got back there, all these people you mentioned were in your house?

A. Yes, sir.

Q. Did you see them?

A. Yes, sir. they were ther when I left.

Q. They were there when you came back, is that right?

A. Yes, sir.

Q. Now, what were you wearing on that day, January 30th, when you came back from the store?

A. I had a green coat on and brown khakis, hat and [240] a white shirt.

Q. You wore a white tam when you went out?

A. No, I didn't have a white tam on then.

Q. Now, did you go out of the house again after you came back between 5:15 and 5:30?

A. Yes, sir.

Q. You did go out?

A. Yes, sir.

Q. What time did you go out again?

A. About 6:00.

Q. All right, where did you go?

A. Over on Wilcox, 4049 West Wilcox.

Q. Now, that's between your house and the 4000 block on Adam, isn't that right?

A. Yes, sir.

Q. This was around six o'clock?

A. It was something to six.

Q. How close to six?

A. About 20 minutes or 15 minutes to six.

Q. So it would have been about quarter to six when you went out of your house?

A. I can't exactly say what time it was.

Q. Did you go out with anybody or did you go out [241] alone?

A. I went out with my partner, Milton Dale.
Q. Milton Dale?
A. Yes.
Q. Where does Milton live?
A. I don't know. We were supposed to work.
Q. He is your partner, is that correct?
A. Yes.
Q. You don't know where he lives?
A. I know he used to live on Madison but he moved.
Q. Where did you two go?
A. Went over to Larry Mason's house.
Q. What time did you get to Larry's house?
A. We walked straight through the alley out of the back of my house, came through the alley and went through a gangway and went over to his house on Wilcox.
Q. So you went down an alley?
A. To Monroe Avenue.
Q. Did you see anybody on the street walking?
A. No, sir.
Q. Did you see any young girl walking?
A. No, sir.
[242] Q. Did you see any young girl walking?
A. No, sir.
Q. Where does Larry live?
A. Where he live then?
Q. Yes. Where did you go, what is the address there?
A. 4029 West Wilcox.
Q. Now, Wilcox would be right between Monroe and Adam, is that right?
A. Yes, sir.
Q. What time did you get to Larry's house?
A. We left out of the house with him about six. We got there about something to six. We got by the house and I can't remember what time it was we got there, after we left, two or three minutes.
Q. Where did you go then?
A. We stayed up in his house for a little while, about 8:00.
Q. Did you leave his house before 8:00?
A. No, sir.
Q. So you were there around 7:30?
A. We were there until about 8:00 and we left something after 8:00.

[243] Q. Who was at Larry's house when you left?
A. His brother Byron and his other brother Tyrone and his mother.
Q. Now, when you were walking out on the street between Monroe and Wilcox, between Monroe and Wilcox, what were the weather conditions that night?
A. I don't know.
Q. January 30th, right?
A. It was kind of cold.
Q. Was there any snow on the ground?
A. Not that much.
Q. Now, was your partner with you all the time when you were at Larry's house?
A. Yes, sir.
Q. Were you working at that time?
A. Was I working?
Q. Yes, at the time during that months of January, were you employed?
A. No, sir.
Q. Did you ever have a gun that day?
A. No, sir, never carry a gun.
Q. Did you have any money with you when you left your house to go over to Larry's house?
[244] A. No, sir.
Q. Did you have any money with you at all that evening?
A. No, sir.
Q. Did you have any money when you went to the store?
A. Yes, sir.
Q. Did you spend it all there?
A. It wasn't mine.
Q. Whose money was it?
A. My mother's.
Q. Where did you go at eight o'clock?
A. We went out to Maywood.
Q. Maywood?
A. Yes.
Q. The town of Maywood?
A. Yes.
Q. Did you see anybody when you got there?
A. Yes.
Q. Name the person you saw?
A. We was out at a dance on 9th Avenue and Madison at

a recreation hall. We seen a couple of more of our partners and girls that we know.

[245] Q. Now, how did you get out to Maywood?

A. We went in Larry Mason's brother's car.

Q. What kind of car was he driving?

A. '66 Wildcat.

Q. Did you ever hear the name Johnnie Mae Johnson before you were arrested?

A. No, sir.

Q. Did you ever see the young lady that testified here in court, Johnnie Mae Johnson?

A. No, sir, never seen her before.

Q. When you got out to Maywood, did you have to pay to get into this dance?

A. Yes, sir.

Q. You didn't have any money with you?

A. Larry Mason paid the way.

Q. What time did you get home that night after the dance?

A. About two or three.

Q. Anybody home when you got home?

A. Yes, sir.

Q. Were they up?

A. No, sir.

Q. Did you see your mother when you got home?

[246] A. No, sir. I went around through the back way.

Q. Now, you were arrested on January 31st. The police came to your home in the evening, is that right?

A. Yes, sir.

Q. They called and they told your mother they were coming?

A. I don't know if they called or not. I was in the kitchen watching TV.

Q. When you were arrested, you weren't handcuffed, were you?

A. Not that I recall. I can't remember.

Q. The police didn't tell you what they were arresting you for?

A. No.

Q. Did you ever hear the word rape mentioned while you were in the apartment with police officers?

A. No, sir.

Q. Then you couldn't have denied anything about a rape if you didn't hear about it?

A. They said I raped Johnnie Mae Johnson.

Q. Then you did hear the word mentioned in your apartment, didn't you?

A. They didn't tell me nothing. They came in there [247] and told me, told my mother they were taking me down to the station.

Q. You couldn't have denied it because you didn't know what you were arrested for, did you, is that right?

A. Yes, sir.

Q. So you didn't deny it?

A. I did not deny what?

Q. You didn't deny raping anybody when you were arrested in your apartment?

A. They didn't tell me what I was arrested for.

Q. They told you your rights when they arrested you, didn't they?

A. No, sir.

Q. Didn't they tell you that you had a right to remain silent?

A. No, sir, they didn't tell me nothing at all.

Q. Didn't they tell you that at the station?

A. No, they didn't tell me that.

Q. They never told you at all?

A. They never told me.

Q. They didn't hit you or anything, did they?

A. No, sir.

[248] Q. They didn't threaten you?

A. No, sir, they didn't threaten me.

Q. And you were not handcuffed at the police station, were you?

A. No, sir.

Q. Now, you were placed in a lineup, isn't that right?

A. Yes, sir.

Q. In the lineup were four other young men?

A. Yes, sir.

Q. And you were told to tell your name, isn't that right, and your address?

A. Yes, sir.

Q. And in that lineup, you were wearing your white hat, tam?

A. Yes, sir.

Q. What color coat were you wearing?

A. Black coat.

Q. Your hand was in a bandage?
A. Yes, sir.
Q. You were wearing a gold earring?
A. I don't know what color earring it was.
Q. What color earring was it?
[249] A. I don't know, I don't remember that.
Q. You put it in your ear that day, isn't that your testimony?
A. Yes, sir.
Q. You cann't remember the color?
A. No, sir.
Q. How many earrings do you have?
A. I have got quite a few.
Q. Now, after the lineup, did you talk to any police officers?
A. No, sir.
Q. Did you ever speak after the lineup?
A. No, sir.
Q. Never said a word to anybody?
A. No, sir.
Q. Weren't you taken downstairs in the lockup and fingerprinted?
A. Yes, sir.
Q. Didn't they ask you your name and address?
A. Yes, sir.
Q. So you did speak when you were downstairs?
A. Yes, sir, just the only officer that I speak to.
Q. You saw the officers that testified here, didn't [250] you?
A. Yes.
Q. You heard what they testified to?
A. Yes, sir.
Q. It is your testimony that you never said anything to them at all?
A. Didn't say anything to them at all.
Q. Then Johnnie Mae Johnson pointed you out in the lineup, didn't she?
A. Yes, sir.
Q. Did you tell the police you were at home on the 30th after the lineup?
A Yes, sir.
Q. You told them that?
A. Yes, sir.

Q. You told them the same thing you told everybody here in court today?
A. Yes, sir.
Q. Now, just so I have this story, Mr. Browder, after the lineup——

MR. MISSIRLIAN: Your Honor, I am objecting.
THE COURT: Well, I don't know what the question is. Go ahead.

[251] MR. DRISCOLL: Q. When did you tell the police officers that you had been home on the 30th with all these people you named and went out to Maywood?
A. When I had told them?
Q. When did you tell them that?
A. When they came to the house. I told them that I didn't know nothing about it.
Q. They didn't tell you what you were charged with, did they? Isn't that your testimony?
A. They had told me at the station. After the lineup, they took me in the Youth Office, Seargeant Flynn's office.
Q. All right, so they did take you in an office?
A. Seargeant Flynn's office. All four of us together and I told them where I was. Me and my brother and all of them were in the same room and I told them that.
Q. What is your brother's name?
A. Tyrone.
Q. Go ahead.
A. Tyrone.
Q. What are the other two boys' names?
A. One is named Stanley Polk and Milton Dale.
Q. And Milton Dale was your partner who you were [252] with on the 30th between five and six, isn't that right?
A. Yes, sir.
Q. Do you remember what your brother was wearing in the lineup?
A. He had a brown coat and black hat and brown khakis on and black shoes.
Q. Was he wearing a hat?
A. Yes, sir.
Q. What color hat was he wearing?
A. Black.
Q. You don't know what color earrings you had on?
A. No, sir.

Q. What hand was bandaged?
A. The right hand.
Q. So these three other people were present when you told the police officers what you are telling us here today?
A. Yes, sir.
Q. They heard your testimony with police officers?
A. Yes, sir.
Q. And then they were released, isn't that right?
A. Yes, sir.
Q. Did you talk to the police officers after that?
[253] A. No, sir. They took me back down and fingerprinted me and took my picture.
Q. So the police were lying, is that what you are saying?

MR. MISSIRLIAN: Objection.
THE COURT: Sustained.

MR. DRISCOLL: Q. Did you say anything to Johnnie Mae Johnson at the lineup?
A. No, sir.
Q. Did you see her point you out?
A. No, sir.
Q. A few more questions, Mr. Browder. I will be all done now. When you were in the lineup, you stated your name and address?
A. Yes, sir.
Q. You stated your name Ben Browder?
A. Yes, sir.
Q. Did you say anything else after your name and address?
A. "Don't look at me". I was told to say that.
Q. Again I'm going to show you People's Exhibit 1. Do you see an earring in your ear in that picture?
A. Yes, sir.
[254] Q. And that is the earring you were wearing?
A. Yes, sir.
Q. As you look at the picture, can you tell us what color earring you were wearing?
A. No, sir.

MR. DRISCOLL: That's all.

THE COURT: Any redirect?
MR. MISSIRLIAN: One question.

REDIRECT EXAMINATION

By MR. MISSIRLIAN:

Q. Ben, when you were in the lineup, was anybody else wearing an earring?
A. Yes, sir.
Q. Who was wearing an earring?
A. I think Nelson Love and my partner, Milton Dale.

MR. MISSIRLIAN: That is all.

RECROSS EXAMINATION

By MR. DRISCOLL:

Q. Who else was wearing an earring?
A. I think Nelson Love and Milton Dale had on one.
Q. Did you know Nelson Love before the lineup?
A. Yes, I know Nelson Love.
Q. Point out Nelson in the picture here, please.
[255] A. (Indicating.)

MR. DRISCOLL: Indicating for the record the man on the far right.

Q. Who is the other man you say was wearing an earring?
A. Milton Dale.
Q. The man who is your partner?
A. Yes.
Q. Which ear is Nelson wearing it?
A. Supposed to wear it in the right.
Q. Which ear is your partner wearing the earring in?
A. The left.
Q. Now, Nelson wasn't arrested with you in your house, was he?
A. No, sir.

MR. MISSIRLIAN: Your Honor, I will object.
THE COURT: Sustained.

MR. DRISCOLL: Mr. Reporter, would you mark this People's Exhibit 2 for identification, please?

(Thereupon, said photograph was marked People's Exhibit No. 2 for identification.)

Q. Mr. Browder, I am going to show you what is marked [256] as People's Exhibit 2 for identification purporting to be a photograph and ask you to look at that.

Do you see yourself in that photograph?
A. Yes, sir.
Q. You are in the center, is that right?
A. Yes, sir.
Q. Nelson is on the far right?
A. Yes, sir.
Q. And in this picture, you can see the right side of his head?
A. Yes, sir.
Q. And he is wearing an earring in his right ear?
A. On that picture, he had on earrings, I don't know for sure.
Q. Do you see an earring in this picture, in Nelson's right ear?
A. No, sir.

MR. DRISCOLL: That's all.

MR. MISSIRLIAN: Thank you very much.

THE COURT: You may step down. Thank you very much.

(Witness excused.)

MR. MISSIRLIAN: Your Honor, the Defense will rest and is ready to proceed in final argument.
[257] THE COURT: The defense rests. Are we ready to proceed?
MR. DRISCOLL: Ready to proceed, your Honor.
THE COURT: All right. Then at this time, ladies and gentlemen, with both sides having rested, the State's Attorney will make a closing argument and then the Attorney for the Defense may make a closing argument, after which the State's Attorney will make a rebuttal.
If you are ready to proceed, gentlemen, we can go right ahead now.
MR. DRISCOLL: The matter of instructions, your Honor?
THE COURT: Let's go ahead now.

CLOSING ARGUMENT

By MR. DRISCOLL:

May it please the Court, Mr. Missirlian, Mr. Salas and ladies and gentlemen of the jury:
At this point, both sides having rested their case, you have heard all the evidence that you will hear in this case.

Now, on behalf of the State, it is my duty in this case to make what is called the opening portion of closing argument. As the Court says, the State [258] has the burden and has two opportunities to address you.
I will make the opening statement and Mr. Missirlian, I presume, will make a closing argument and my partner, Mr. Salas, will make a final argument to you.

• • •

[265] You have heard the police officers testify, [266] four officers that went to the house to arrest the defendant. The Investigator from the Homicide-Sex Unit of Area 4 was called in in this type of case. They were present at the 11th District on the 31st of January. You heard the officer testify that the defendant was arrested with those other three men, advised of his rights, taken to the 11th District to be placed in a lineup. At the 11th District, you heard that Johnnie Mae Johnson had made an identification of him.

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[268] The defendant decided to take the stand in this case. I want to comment on that because I think it is worth commenting upon. Ben Browder got up here this morning. Counsel asked him, "Did you rape Johnnie Mae Johnson?" "No." Obviously not or we wouldn't be here. He stated he didn't have a gun. That's about [269] it.
On cross examination, I asked him where he was at the time of the rape. He is at home. Eight or nine other people there, his mother, brother, friends, partner. Where are these people? Why didn't they come forward to tell you that this defendant, he was not out in the basement.

MR. MISSIRLIAN: Your Honor, I will object.
THE COURT: Proceed, counsel.

MR. DRISCOLL: Thank you. Nobody got up there. Where are these other people? Where is Larry over on Wilcox or wherever it is? Why aren't these people in here if that's the truth? Where are all these people? If the defendant wasn't out on the street, where are all these people? They can come forward and tell you. His own mother could say he was at home, he wasn't out raping anybody. You didn't hear that, ladies and gentlemen, because it didn't happen that way. He was out in the basement with Johnnie Mae Johnson.

The defendant asks you to believe his testimony. Based upon his testimony, he would ask you to find him not guilty, to show that there is a reasonable doubt of guilt.

[270] Well, I submit if you believe that testimony that much, something like that, uncorroborated by anyone else, then cut him loose, out the door he will go and, well, God help anybody else because this man does not deserve to go back out on Van Buren or Adam or Wilcox or Monroe, not from what he did to Johnnie Mae Johnson.

I submit, ladies and gentlemen, that you are not going to be fooled by this kind of testimony, mere denial, no corroboration of where he was, nothing, nothing. He asks you to believe him, but he mentions all of these other people. It is uncorroborated. You have to determine if Ben Browder is telling the truth in this case. I submit, ladies and gentlemen,——

MR. MISSIRLIAN: Object.

THE COURT: Proceed, counsel. I will sustain the objection. Proceed with your comments.

• • •

[271] In Mr. Missirlian's opening arguments, he [272] mentioned two issues that he wants you to consider. I think they are important, the issue of identification which I have talked about. That is an important thing because that is what we are here for, to determine if Ben Browder is in fact guilty, guilty after the identification, the testimony of Johnnie Mae Johnson.

I don't think that she made the wrong identification. She picked out the man who raped and robbed her as it happened on January 30th.

• • •

[274] One last point I would like to make. Counsel in his opening statement said you have to determine whether an admission was made by Ben Browder. Again, it becomes an issue of credibility, if you believe Ben Browder or if you disbelieve three police officers. You heard them. That is your determination to make. You think the officers got up here and lied?

MR. MISSIRLIAN: Objection.

MR. DRISCOLL: It is a matter of credibility.

THE COURT: Sustained.

MR. DRISCOLL: Ladies and gentlemen, I will ask you to find this defendant guilty, we asked you at the beginning and we will ask you at the end. We have met our burden. It becomes your duty now to resolve the issues, seeing what the verdict will be, and as to your determination, I know you will make a faithful determination, following the evidence with the Court's rulings at the beginning.

We thank you for your attention. Thank [275] you very much.

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(Conference on jury instructions, Tr. 275-78, omitted.)

[278] THE COURT: All right, be seated, please. Mr. Missirlian?

MR. MISSIRLIAN: Your Honor, based on the evidence, we would waive final argument.

THE COURT: Final argument is waived. All right.

(Jury instructions, Tr. 278-93, omitted.)

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[295] THE COURT: All right, you may be seated, please. Mr. Foreman, have you reached a verdict?

THE FOREMAN: Yes, we have.

• • •

THE COURT: The verdicts are:

"We, the jury, find the defendant, Ben E. Browder, guilty of rape."

"We, the jury, find the defendant, Ben E. Browder, not guilty of armed robbery."

• • •

(Proceedings of September 28, 1971)

[298] MR. MISSIRLIAN: Your Honor, this is Mr. Browder before the Court in Indictment No. 71-1081 in which there has been a finding of guilty by a jury; and Indictment No. 1079 yet to be disposed of.

On Indictment No. 1081 I believe I have a motion for new trial.

THE COURT: All right. The record will reflect a motion for new trial has been filed.

Do you wish to argue it?

[299] MR. MISSIRLIAN: Yes, if I may have a moment.

Your Honor, this was a jury trial, as the Court is aware, and there were two charges, Mr. Browder was first charged with armed robbery and then rape. The jury came in with a finding of not guilty as to the armed robbery and guilty as to the rape.

First I'd like to say to this Court, I feel that the verdicts were inconsistent by the jury, I think it was a compromised verdict, the jury felt Mr. Browder was guilty of something so they decided that rape should be the charge.

Secondly, there was no competent evidence of corroboration as to the victim's testimony, or prosecutrix' testimony, as to the rape. There were no fingerprints, no gun recovered, there was no officer who testified that he returned to the scene, there was no competent medical testimony that a rape in fact had occurred. The only testimony was by the victim and, in fact, she testified that she made some comment to some other people that she had been raped after, to some people, but no witnesses were brought in to testify to this fact.

Another point I'd like to bring out on [300] the motion for new trial, I feel that the Court was in error when it denied the defendant's motion to suppress the in court identification or, in the alternative, the lineup that was conducted in this cause, pictures of that lineup were introduced, the jury had an opportunity to look at these pictures and the State made great reference to the lineup, at the lineup the defendant was one of only two individuals who had a white tam on, the defendant was one of two individuals who had an earring, the defendant was the only individual to have a cast or a white bandage on his arm. These facts and plus the description of the individual and the clothing that he allegedly wore at the time of the rape coincided to what the defendant, Mr. Browder, wore at the time of the lineup. The police were aware of that. Who else could the prosecutrix pick out at that lineup than the man with the bandage on his hand? The police officer did not testify they could have removed the bandage as they could have, it was not a cast as the Court is aware but a bandage, and this could have been removed to allow a fair lineup. All of the participants could have wore white tams or wore no hats at all. We feel [301] that the Court erred in at least not allowing the lineup to be brought in, if at all, allowing the in court identification. At this point we'll rest on the facts.

THE COURT: All right. Do you care to respond?

MR. SALAS: Briefly in reply as to the allegation regarding the inconsistency of the verdicts, one of the elements of rape is that some form of force is applied, the fact that the jury may not have found him guilty of armed robbery in no way is inconsistent since in order to find that someone committed the offense of rape they would show some element of force which certainly the victim testified to in this cause, and that Ben Browder did force her down into this basement area. I don't feel that by the mere fact that the jury did not find the defendant guilty of armed robbery that this is necessarily an inconsistent verdict.

• • •

[302] Regarding the lineup, the court heard motions to suppress the identification, this court denied motions to suppress the identification. There is no question that the victim had an independent opportunity to observe. The Court will recall she testified in the motion that she had seen Mr. Browder as she passed an alley, she seen Mr. Browder again as she was turning a corner, she had seen Mr. Browder during the period that they were down in the basement, she had seen Mr. Browder during the period they were leaving the basement, she had seen Mr. Browder when they had gone out into the alley, she had seen what Mr. Browder was wearing and he had a gun in his hand with the bandage. This is an extremely unusual type of defendant, unusual looking defendant, your Honor, where he has a [303] bandage on one hand. Counsel would expect the police to remove the bandages, et cetera, from the man's hand and perhaps endanger his health in some form or another. I submit, under the circumstances, the fairest lineup that was possible was held, and in light of the fact the victim had independent opportunities to observe and that the fairest lineup under the circumstances was had, all young male Negroes approximately the same height, the Court will remember this was testified to by the victim.

I believe the motion for new trial made by defense counsel

is unsupported and the State would request the motion for new trial be denied.

THE COURT: The motion for new trial is denied.

• • •

(Sentencing proceedings, Tr. 303-10, omitted.)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title omitted in printing)

MEMORANDUM AND ORDER

Petitioner, presently in state custody, seeks a writ of habeas corpus pursuant to 28 U.S.C. Section 2254. Under the circumstances of this case, once having directly appealed his conviction, petitioner was not required to seek relief on the same issue under the Illinois Post Conviction Hearing Act to satisfy the doctrine of exhaustion of state remedies applicable in federal habeas corpus actions. See *U.S. ex rel Gates* v. *Twomey*, 325 F.Supp. 920 (N.D. Ill. 1971) and *U.S. ex rel Williams* v. *Brantley*, 502 F.2d 1383 (7th Cir. 1974). However, petitioner has an appeal from the denial of post conviction relief pending in the Illinois Appellate Court, First District. Therefore, as a matter of comity, the Court will stay proceedings in this cause until such time as the Illinois court rules or dismisses the case on petitioner's motion for voluntary dismissal.

WHEREFORE, the proceedings are stayed.

IT IS SO ORDERED.

Dated: March 7, 1975

/s/ Joel M. Flaum
United States District Judge

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

No. 60582

PEOPLE OF THE STATE OF ILLINOIS, *Respondent-Appellee,* v. BEN EARL BROWDER, *Petitioner-Appellant.*	Appeal from the Circuit Court of Cook County. Honorable Philip Romiti, Presiding.

(Opinion filed June 2, 1975)

Before McGLOON, P.J., DEMPSEY and McNAMARA, JJ.

PER CURIAM:

Ben Earl Browder, petitioner, appeals the denial of his post-conviction petition filed pursuant to the Post-Conviction Hearing Act (Ill. Rev. Stat. 1973, ch. 38, par. 122-1 *et seq.*) without an evidentiary hearing.

Petitioner was originally charged by indictment with the crimes of armed robbery and rape. After a jury trial he was found guilty of armed robbery and sentenced to a term of four to fifteen years. Petitioner appealed to this court which on July 2, 1973, affirmed the judgment of conviction. (*People v. Browder* (1973), 13 Ill. App.3d 198, 300 N.E.2d 511. The Illinois Supreme Court denied leave to appeal.) On August 16, 1973, petitioner filed a post-conviction petition. Upon motion of the State, on December 13, 1973, petitioner's post-conviction petition was denied without an evidentiary hearing.

Petitioner appeals arguing that he was entitled to an evidentiary hearing on the allegations in his post-conviction petition: (1) he was denied the effective assistance of counsel in that trial counsel failed to secure four alibi witnesses and failed to move to suppress the fruits of petitioner's apparently unlawful arrest and (2) he was improperly denied his constitutional right to counsel at his lineup identification.

Petitioner's first contention on appeal is that he was entitled to an evidentiary hearing on the allegation in his post-conviction petition that trial counsel was incompetent in that he failed to secure four alibi witnesses. In order to

show a deprivation of a constitutional right to counsel, petitioner must clearly establish [2] actual incompetency of counsel as reflected by the manner of carrying out his duties as the trial attorney and substantial prejudice resulting therefrom without which the outcome would probably have been different. *People v. Lynch* (1973), 11 Ill. App.3d 479, 297 N.E.2d 382.

In the case at bar, petitioner, in an affidavit attached to his post-conviction petition, stated that prior to trial he had informed defense counsel of the existence of four alibi witnesses, two of whom were defendant's mother and brother, but that defense counsel informed him that the presence of the alibi witnesses would not be necessary. As pointed out in this court's affirmance of defendant's conviction "* * * the proof left no doubt whatsoever of his (defendant's) guilt." Indeed, a review of the evidence adduced at trial demonstrates that the State's case was overwhelming. The evidence adduced at trial revealed that the crime occurred at approximately 5:45 p.m. Defendant's testimony at trial established that his alibi witnesses would only have testified to his presence from 5:30 p.m. and thereafter. Petitioner's affidavit stated that although counsel was aware of the four alleged alibi witnesses, he chose not to call them at trial. Under these circumstances, we conclude that the failure to call the alibi witnesses was a matter of trial tactics and does not demonstrate incompetency of counsel. (*People v. Talasch* (1974), 20 Ill. App.3d 794, 314 N.E.2d 510.) As pointed out in a specially concurring opinion in affirming petitioner's conviction "This record shows that defendant was quite ably represented in the trial court." The record in its entirety establishes that trial counsel at all times properly represented the petitioner considering the fact that he was faced with an extremely strong State's case. We believe that defendant received adequate and competent representation at trial.

Petitioner's next contention is that he was entitled to an evidentiary hearing on the allegation that his trial counsel was incompetent in that counsel failed to move to suppress the fruits of petitioner's unlawful arrest. In his post-conviction petition [3] filed in the trial court, petitioner argued that his arrest was illegal and that all things flowing

therefrom should have been suppressed as the fruit of the poisonous tree. However, petitioner did not allege that trial counsel was incompetent for failing to raise this issue. The rule is well established that where an argument is not raised in the post-conviction petition filed in the trial court, it may not be raised for the first time on appeal. *People v. Turner* (1970), 47 Ill.2d 7, 264 N.E.2d 145; *People v. Eldredge* (1969), 41 Ill.2d 520, 244 N.E.2d 151.

In addition, petitioner in his direct appeal argued that his arrest was illegal and that his identification and admissions following such arrest should have been suppressed as the fruit of the poisonous tree. The rule is well established that where defendant has appealed his conviction, any allegation which has been considered and rejected by the court in that appeal, cannot be reconsidered in post-conviction proceedings under the doctrine of *res judicata*. (*People v. Walker* (1972), 6 Ill. App.3d 909, 286 N.E.2d 812; *People v. Westbrook* (1972), 5 Ill. App.3d 970, 284 N.E.2d 695.) Petitioner having argued in his direct appeal that his arrest was illegal and that all things flowing therefrom should have been suppressed is now barred from any further reconsideration of that issue in post-conviction proceedings by the doctrine of *res judicata*.

Petitioner's final contention is that he was entitled to post-conviction relief on the allegation in his petition that he was denied his constitutional right to counsel at his lineup identification. In *Kirby v. Illinois* (1972), 406 U.S. 682, 32 L.Ed.2d 411, 92 S.Ct. 1877, the Supreme Court held that the right to counsel applies only at or after the time that adversary judicial proceedings have been initiated against him.

In *People v. Johnson* (1973), 55 Ill.2d 62, 302 N.E.2d 20, the defendant was found guilty after a jury trial of the crimes of murder and armed robbery. The facts adduced at trial showed that defendant was arrested at his home without a warrant and was taken [4] to the police station where a lineup was conducted. On appeal defendant argued that he had a constitutional right to counsel at the lineup. The Supreme Court rejected defendant's contention holding that adversary judicial proceedings had not yet been initiated at the time of defendant's lineup. See also *People v. Reese* (1973), 54 Ill.2d 51, 294 N.E.2d 288.

Similarly, in the case at bar, defendant was placed under

arrest at his home without a warrant and taken to the police station where a lineup was conducted. At the time of the lineup adversary judicial proceedings had not yet been initiated and the absence of counsel did not deny defendant any of his constitutional rights.

For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title omitted in printing)

ORDER

Order Petition for Writ of Habeas Corpus granted. Respondent given sixty days to retry the petitioner or the Writ of H.C. shall be executed.
Dated: October 21, 1975.

/s/ Joel M. Flaum
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title omitted in printing)

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

Before the court is the respondent's motion to dismiss the plaintiff Ben Browder's petition for a writ of habeas corpus. On August 27, 1971, petitioner Browder was convicted of rape in a jury trial before the Circuit Court of Cook County. He was sentenced to a term of four to fifteen years at the Illinois State Penitentiary at Stateville where he is presently confined. Petitioner, having exhausted his state remedies, seeks federal relief pursuant to 28 U.S.C. § 2254 on the grounds that his conviction was obtained by the use of evidence resulting from an allegedly unlawful arrest.

Based on the trial transcript, the facts surrounding the petitioner's arrest and subsequent conviction appear to be the following. On January 31, 1971, upon receiving information with regard to an alleged rape of a Ms. Alexander by a possible offender named Browder, a police officer assigned to the case scanned his files and discovered a listing of one Tyrone Browder, the petitioner's brother. [Trial record 30-31.] After learning that the petitioner and his brother Tyrone were at home, the police drove to the petitioner's residence. Upon arriving, the officers identified themselves and informed Mrs. Browder that they were looking for her son Tyrone with regard to an assault on a girl. The arresting officer testified that Mrs. Browder responded by remarking that she did not think it was her son Tyrone that they wanted, but rather her other son, Ben Earl. [Trial record 35.] The officers entered the residence without a search or arrest warrant. Present in the apartment was the petitioner, his brother Tyrone and two other male adults. The officers questioned the male adults, informed them of their constitutional rights, and told them they were being placed under arrest in connection with an "investigation of rape." [Trial record 163.] The four arrestees were then transported to the district station house and placed in a line-up. Ms. Alexander viewed the line-up and identified the peti-

tioner as her assailant. The line-up was then viewed by Ms. Johnson, another rape victim, who also identified the petitioner as her assailant. Petitioner was tried and convicted for the rape of Ms. Johnson.

After the line-up, the petitioner asked if he could speak with the arresting officer and his partner. The arresting officer took the petitioner into a vacant office where the petitioner told him that he had raped Ms. Johnson, but not Ms. Alexander. [Trial record 52.] The petitioner was once again informed of his right to remain silent and his right to counsel. The arresting officer informed the Area Investigator that petitioner had made an admission, and petitioner was taken into another room where he repeated his statement to the Area Investigator. No written statement was ever taken.

Prior to trial, petitioner's appointed counsel moved to suppress the line-up identification and confession on the ground that the former was suggestive and that the latter was procured without giving the requisite *Miranda* warnings. The trial court ruled that the line-up was not constitutionally defective and that petitioner had been sufficiently informed of his rights on several occasions. The line-up identification, the statements and Ms. Johnson's in-court identification were introduced and admitted at trial.

The petitioner's counsel failed to challenge the constitutionality of the arrest at trial or in post-trial motions. Counsel raised the issue of tse alleged unlawful arrest for the first time on direct appeal. On appeal, the Illinois Appellate Court held that under Illinois law, Browder had waived his right to challenge the constitutionality of his arrest because he failed to object to it at the trial. *People v. Browder*, 13 Ill. App.3d 193, 300 N.E.2d 511 (1973) (abstract only). Likewise, Browder was estopped from raising the issue of the arrest in his petition for post-conviction relief. *People v. Browder,* No. 60582.

The threshold issue raised by the respondent's motion to dismiss is whether failure to address the alleged unlawful arrest constituted a deliberate tactical waiver of the defect for purposes of federal habeas corpus relief.

The Supreme Court has stated that a claim should not be deemed waived for purposes of federal habeas corpus relief absent evidence that it was the result of a deliberate tactical decision to forego such a claim. *Fay v. Noia,* 383 U.S. 391

(1963). Moreover, as a waiver of a federal right is a federal question, a state court's finding of waiver does not bar an independent determination of the question by the federal courts. *Fay v. Noia, supra.* at 439. To forego a constitutional claim does not require a client's acquiescence and approval of every decision made by counsel. *U.S. ex rel Allum v. Twomey,* 484 F.2d 740 (7th Cir. 1973). Rather, waiver of a constitutional claim requires objective evidence that the omission was the result of an intelligent and deliberate relinquishment as a part of counsel's trial strategy, and not inadvertent or negligent mistake. *See generally, Henry v. State of Mississippi,* 379 U.S. 443, 451-52 (1965); *Pope v. Swanson,* 395 F.2d 321, 322-26 (9th Cir. 1968); *Curry v. Wilson,* 405 F.2d 110, 112-14 (9th Cir. 1968); *cert. denied,* 397 U.S. 973 (1970).

The *Twomey* court provided an objective test for the determination of what conduct constitutes deliberate waiver.

> The question of whether there has been an effective (or "deliberate") waiver turns, we believe, not on subjective motivation, but on an evaluation of the act or omission giving rise to the waiver, as well as the significance of its consequences. 484 F.2d at 745.

Applying this test to the conduct of petitioner's counsel the court finds that failure to raise the alleged illegality of the petitioner's arrest does not constitute a conscious waiver that would bar this petition. Unlike *Twomey* where the court found that there was a reasonable tactical basis for failure to object to certain evidence, from the nature of evidence introduced at petitioner's trial no reasonable tactical basis is apparent to justify the failure to object.

As the alleged defect has not been waived, the issue before the court is twofold: was the petitioner's arrest unlawful, and if so does the unlawful arrest taint the evidence used in his criminal conviction? *Wong Sun v. United States,* 371 U.S. 471 (1963). For purposes of clarity these issues will be examined separately.

The test for the legality of a warrantless arrest has been framed by the Supreme Court in the following language:

> Whether that arrest was constitutionally valid depends in turn upon whether at the moment the arrest was made the officers had probable cause to make it—whether at that moment the facts and circumstances

> within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed . . . the offense. Beck v. Ohio, 85 S.Ct. 223, 225 (1964).

In the instant case the evidence in the record indicates no basis upon which the arresting officer might have formed a belief that petitioner Browder raped Ms. Alexander. Brief reference is made in the record to the origin of the investigation of Tyrone Browder, petitioner's brother. The arresting officer testified, "Well I had information regarding a rape of a Sharon Alexander and a possible offender named Browder." [Trial record 31.] The police sought Tyrone at the Browder residence where Mrs. Browder commented that the police probably wanted her other son, Ben Earl. The comment by Mrs. Browder that the police probably wanted Ben Earl cannot suffice for such "reasonably trustworthy information . . . to warrant a prudent man in believing that the petitioner committed the offense." *Beck v. Ohio, supra.* The fact that the police arrested all four black males in the residence (the petitioner, his brother and two unidentified persons) on a charge of "investigation of rape" lends further support to the petitioner's argument that the police acted without probable cause. *Davis v. Mississippi,* 394 U.S. 721 (1969); *Mallory v. United States,* 354 U.S. 449 (1957).

After examining the record the court finds no evidence sufficient to conclude that the arrest of petitioner Browder was made with probable cause. Accordingly the court concludes that the arrest was unlawful.

An illegal arrest does not necessarily render all evidence subsequently obtained inadmissible. The question of admissibility turns on whether "the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States,* 371 U.S. 471, 487-88 (1963). For purposes of analysis, the evidence of the line-up identification the oral confession and the in-court identification will be discussed separately to determine admissibility under *Wong Sun.*

The inquiry under *Wong Sun* is not a "but for" analysis, but rather one focusing on the specific intervening circumstances and events which may purge the taint of the original

illegality. The Seventh Circuit Court of Appeals has suggested three ways in which the taint may be purged: if the evidence was discovered by an independent source, if the evidence would have been gained inevitably without the illegality, or if the evidence is sufficiently distant in causal connection that the connection has become so attenuated as to dissipate the taint. *U.S. ex rel Owens v. Twomey,* 508 F.2d 858 (7th iCr. 1974). Applying these general concepts to the line-up identification by Ms. Johnson which was admitted at petitioner's trial, the court finds no support in the record for finding that the taint of the illegal arrest has been purged. As the petitioner was purposefully taken into custody in connection with the investigation of the rape of Ms. Alexander the first two criteria appear to be inapplicable. Further the record does not indicate that the line-up identification was sufficiently distant in causal connection as to dissipate the taint of the arrest. The line-up was held after the illegal arrest and no significant intervening factors are mentioned in the record which could purge the taint of the arrest. *Johnson v. Louisiana,* 406 U.S. 356 (1972). The respondent argues that as the line-up itself was not constitutionally defective or overly suggestive (a fact not clear from the record), the line-up has purged the taint of the illegal arrest. The respondent has cited no authority holding that a proper line-up held immediately after an illegal arrest and in the absence of any other intervening factor purges the taint of the primary illegality. Accordingly, the court finds that the taint of the illegal arrest was not purged prior to the identification by Ms. Johnson, thus that identification was tainted and inadmissible.

In evaluating the admissibility of an oral confession subsequent to an illegal arrest, the court must determine whether the causal chain between the illegal arrest and the oral confession has been broken. The respondent argues that two events have purged the taint of the original illegality: the line-up identification by Ms. Johnson and the proper giving of *Miranda* warnings. The court finds that neither of these events effectively dissipates the taint of the arrest. Petitioner made his oral confession after an identification by Ms. Johnson which this court has determined to be inadmissible. No intervening event between the line-up and the confession has been brought to the court's attention, thus on the facts before it the taint of the illegal arrest adheres

to the oral confession. The respondent also argues that the proper giving of *Miranda* warnings [Trial record 52] purges the taint of the arrest. In light of *Brown v. Illinois,* 95 S.Ct. 2254 (1975), this court cannot agree. In *Brown* the court clarified the interrelation of the Fourth and Fifth Amendments as regards oral confessions by noting:

> If *Miranda* warnings by themselves were held to attenuate the taint of an unconstitutional arrest regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted . . . *Miranda* warnings alone and per se cannot always make the act sufficiently a product of free will to break for Fourth Amendment purposes the casual connection between the illegality and the confession . . . The voluntaryness of the statement is a threshold requirement. And the burden of showing admissibility rests of course on the prosecution. 95 S.Ct. at 2261.

The court thus found the *Miranda* warnings are but one factor to be evaluated in conjunction with police coercion, and the temporal and physical proximity of the arrest in determining whether the statements were sufficiently an act of the free will to purge the primary taint. *See, United States v. Fallor,* 457 F.2d 15 (10th Cir. 1972). Evaluating these factors in light of the record, the court finds that the tainted line-up and the *Miranda* warnings did not purge the taint of the petitioner's illegal arrest.

The admissibility of a victim's in-court identification hinges upon whether it was sufficiently reliable because of an independent basis despite participation in a tainted line-up. *U.S. ex rel Kirby v. Sturges,* 510 F.2d 397 (7th Cir. 1975); *United States v. Ganter,* 436 F.2d 364, 371-72 (7th Cir. 1970).

The trial court's finding of fact with respect to petitioner's motion to suppress indicates that Ms. Johnson had sufficient opportunity "to observe, to note and to remember her assailant, apart and unaffected by any subsequent line-up identification." [Trial record 98.] After reviewing the record this court finds that the in-court identification was not the "fruit of the poisonous tree," but rather the product of an independent basis properly admitted at petitioner's trial.

Having found that tainted line-up identification and an oral confession were admitted at petitioner's trial, this court must determine the overall effect of that tainted evidence on the petitioner's conviction. As the Supreme Court noted in *Chapman v. California,* 386 U.S. 18, 24 (1967) "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." In applying this standard to the tainted evidence admitted at petitioner's trial, the court must make a determination based on a "reading of the record and on what seems to have been the proper impact" of the evidence. *Harrington v. California,* 395 U.S. 250, 254 (1969). Upon examining the record in the instant case this court cannot conclude that the tainted evidence introduced at petitioner's trial was harmless beyond a reasonable doubt.

Accordingly, the court finds the petition for a writ of habeas corpus is hereby GRANTED. The respondent is granted sixty days in which to retry the petitioner or the writ of habeas corpus shall be executed.

/s/ Joel M. Flaum
United States District Judge

Dated: October 21, 1975.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title omitted in printing)

MOTION TO FURTHER STAY THE EXECUTION OF THE WRIT OF HABEAS CORPUS AND TO CONDUCT AN EVIDENTIARY HEARING

The respondent by his attorney, WILLIAM J. SCOTT, Attorney General of the State of Illinois respectfully moves this Court to further stay the issuance of the writ of habeas corpus and to hold an evidentiary hearing on the merits of the issue presented by the petition. In support of this motion, respondent submits the following:

1. The petition for writ of habeas corpus was filed on January 8, 1975. Respondent filed a motion to dismiss the petition on February 11, 1975. Proceedings were stayed in this Court pending disposition of petitioner's Illinois appeal. (Memo. Op., 3-7-75).

On October 21, 1971, this Court denied respondent's motion to dismiss and issued a writ of habeas corpus and stayed execution for 60 days.

2. Respondent submits that this court erred in granting the writ without first conducting an evidentiary hearing to determine if in fact petitioner was arrested without probable cause and if so, whether his confession was thereby tainted.

3. The purpose of an evidentiary hearing in a habeas corpus proceeding under 28 U.S.C. § 2254 is to provide a plenary hearing where the facts on which the constitutional claim is based have not been adequately developed by the state court. *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745 (1963). *Townsend, supra,* clearly indicates that both the *state* and the petitioner have the right to present evidence outside the record on disputed issues. At p. 322. Further the Court of Appeals for the Third Circuit specifically held that the state and petitioner are on equal footing when claiming the right to a hearing and that the public interest demands that "the opportunity be given to present evidence which might show that the petitioner suffered no constitutional deprivation." *U.S. ex rel. McNair v. State of New Jersey,* 492 F.2d 1307, 1309.

4. A hearing is required because there has *never* been, in state or federal court, an examination of the facts leading to petitioner's arrest. The probable cause issue was never raised in the trial court and the events leading up to petitioner's arrest were alluded to, but never fully explored, in the hearing on the motion to suppress. Indeed from a preliminary inquiry into matters outside the record it appears that one could reasonably believe that probable cause did exist.

5. In granting the writ this court stated:

> "In the instant case the evidence in the record indicates no basis upon which the arresting officer might have formed a belief that petitioner Browder raped Ms. Alexander. . . . After examining the record the court finds no evidence sufficient to conclude that the arrest of petitioner Browder was made probable cause."
>
> Memo Op., 10-21-75, at pp. 7-8.

Assuming the validity of these statements the problem remains that the issue of probable cause was never litigated and therefore the paucity of evidence in the record relating to the probable cause issue, understandable.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court stay the issuance of the writ of habeas corpus and grant an evidentiary hearing on the merits.

Respectfully submitted,
WILLIAM J. SCOTT
Attorney General
State of Illinois

By: Raymond McKoski
Assistant Attorney General
188 W. Randolph St. (Suite 2200)
Chicago, Illinois 60601

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title omitted in printing)

ORDER

Before the court is the respondent's motion for a stay of the execution of a writ of habeas corpus pending an evidentiary hearing on the determinative issue of probable cause. The respondent asserts that the state trial record submitted to this court does not afford an opportunity for a complete examination of the crucial facts surrounding the arrest of the petitioner. The court notes that this argument was not raised by the respondent prior to the ruling in this cause. However, the court concludes that the request for an evidentiary hearing should not be denied solely because it is untimely. *Townsend v. Sain,* 372 US 293 (1963); *US ex rel McNair v. New Jersey,* 492 F2d 1307 (3rd Cir 1974). Accordingly the respondent's motion for stay of execution of writ is GRANTED pending an evidentiary hearing on the issue of probable cause.
Dated: December 8, 1975.

/s/ Joel M. Flaum
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title omitted in printing)

ORDER

Evidentiary hearing in this matter set for January 5, 1976 at 10:30. Evidence and argument shall be specifically directed to the issue of probable cause to arrest.
Dated: December 12, 1975.

/s/ Joel M. Flaum
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title omitted in printing)

PETITIONER'S MOTION TO VACATE ORDERS

Petitioner, by counsel, moves the Court to vacate its orders of December 8, 1975 and December 10, 1975, granting respondent's motion to stay issuance of the writ of habeas corpus, and setting this cause for an evidentiary hearing on January 5, 1975. In the alternative, petitioner requests that the Court order his enlargement from custody, pending disposition of proceedings in this cause.

As set out in the attached memorandum, the court no longer has jurisdiction to alter or amend its final order of October 21, 1975, and the orders whose vacature is sought are void orders.

Respectfully submitted,
/s/ Kenneth N. Flaxman
One of the attorney for petitioner

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title omitted in printing)

TRANSCRIPT OF PROCEEDINGS

had at the hearing of the above-entitled cause before the HON. JOEL M. FLAUM, Judge of said Court, in his Courtroom, United States Courthouse, 219 South Dearborn Street, Chicago, Illinois, on Wednesday, the 7th day of January, A.D., 1976, at 11:00 o'clock a.m.

[2] THE CLERK: 75 C 69, United States of America, ex rel Ben Earl Browder versus Director, Department of Corrections, State of Illinois.

Hearing on a petition for writ of habeas corpus.

MR. FLAXMAN: Kenneth Flaxman on behalf of the petitioner.

MR. MCKOSKI: Raymond McKoski for the defendant.

• • •

[4] MR. FLAXMAN: In addition there has been some question between us as to who has the burden of going forward in the hearing.

It is our position that there has already been a hearing, when the State Court record was filed and memoranda were filed. To resolve that problem we would like to offer, or re-offer into evidence the State Court record, and then rest our case at this point.

THE COURT: All right.

MR. MCKOSKI: If I understand your Honor, Mr. Flaxman is assuming he has the burden of proof and in fulfilling that burden now he is offering the exhibit, if I understand it. It that correct?

MR. FLAXMAN: I am re-offering the exhibit.

THE COURT: All right, the re-offer of the State Court transcript will be accepted.

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[5] MR. MCKOSKI: I understand the petitioner has rested his case?

THE COURT: That is the statement.

MR. MCKOSKI: At this time I move for a directed verdict with a finding in favor of the respondent and against the petitioner, on the basis, the trial transcript which he has introduced as Exhibit 1 has absolutely nothing to do with whether or not there was probable cause. Nothing in that—let me put it this way: Petitioner's Exhibit 1 is made up of the transcript of the trial, State trial of the petitioner and a moion to suppress. At neither of those hearings, hearing or trial, was the issue of probable cause raised, or was there any evidence at all offered on that issue.

The sole petitioner's case that he has presented here is a transcript that has nothing to do with the issue that is before the Court.

The transcript, as far as it relates to probable cause relates zero, because the issue was never raised. Therefore the petitioner has not fulfilled his burden of proving his allegation which was that the arrest [6] was without probable cause by a preponderance of the evidence or any evidence for that matter, because evidence has been introduced on the allegation.

MR. FLAXMAN: I think, your Honor, it has already been stated in the memorandum and I have nothing further to add.

THE COURT: The motion at this point will be denied.

(Thereupon the respondent presented the following case, to-wit:)

MR. MCKOSKI: Your Honor, for our first witness we would call Jim Newson.

* * *

DIRECT EXAMINATION

By MR. MCKOSKI:

Q. Mr. Newson, wil you state your full name, please?
A. Jim Newson, N-e-w-s-o-n.
[7] Q. And could you tell us what your occupation is?
A. I'm a patrolman for the City of Chicago.
Q. You are on the Chicago Police Force, is that correct?
A. Correct.
Q. Could you tell us what your present assignment is?
A. I am presently assigned to 11th and State as a beat patrolman.

Q. On January 29, 1971 could you tell us what your assignment was on that date?
A. I was assigned to Beat 1129.

* * *

Q. On that same day, Mr. Newson, January 29, 1971, did you receive an assignment to interview a Sharon Alexander?
A. I did, sir.
[8] Q. Was anyone assigned with you?
A. Yes, sir.
Q. Could you state the name, please?
A. Officer Haladchuk, H-a-l-a-d-c-h-u-k.
Q. Where was he employed?
A. As a patrolman with the City of Chicago Police Department.
Q. After you received this assignment where did you proceed?
A. To 3906 West Van Buren.
Q. Is that in the City of Chicago?
A. In the City of Chicago, yes.
Q. Do you recall the approximate time that you went to this address?
A. At approximately 8:05.
Q. When you arrived there could you describe the premises that were at that address?
A. Yes, it was a two-flat apartment building.
Q. What did you do when you arrived there?
A. I interviewed one Sharon Alexander.
Q. Was anyone else present when you interviewed her?
A. Her mother, Annette Alexander.
Q. Anyone else besides those two people and your partner?
A. My partner and myself.
[9] Q. Did you have a conversation with Sharon Alexander at that time?
A. I did, sir.
Q. Could you relate please what you said to her and what she said to you at that conversation?
A. She was asked to tell us what happened and she proceeded to say that while walking eastbound on Van Buren about 3922 she was approached by two black males, one of which placed his hand over her mouth and told her to give him her money, to give her money to them.

She was subsequently forced into the entrance of a basement where she was sexually attacked.

Q. Did she mention anything about the location of the basement?

A. No, just the basement apartment.

Q. She mentioned the date that this took place?

A. It was on that date, the 29th of January, 1971.

Q. Did you have any further conversation with her at that time?

A. Yes, I asked her if she could describe them.

They were two black males, one light-complected and one dark-complected, both wearing brown jackets and in their late teens.

Q. Sharon Alexander gave you that information, is that correct?

[10] A. That's correct.

* * *

Q. Mr. Newson, do you recall any further conversation at that time with Sharon Alexander, at that time, or her mother?

A. None that I recall, no.

Q. After the conversation what did you do?

A. Took her to the Cook County Hospital.

Q. Took who?

A. I took Sharon Alexander and her mother, Annette.

Q. And where did you take them?

A. To Cook County Hospital.

Q. You left both of them there, is that right?

A. I did, sir.

Q. After your interview with Sharon Alexander did you have occasion to prepare any reports?

A. I did, sir.

Q. I would like now to hand you what has been marked Respondent's Exhibit 1 for identification, a document which consists of two pages, and ask you if you recognize that document?

A. I do, sir.

[11] Q. Could you tell me what it is?

A. City of Chicago Police Department Police Report.

Q. Who is it filled out by?

A. Myself.

Q. Is that your handwriting that appears on both pages?

A. It is, sir.

Q. And when did you fill it out?

A. January 29, 1971.

Q. Where did you receive the information that you included in the report?

A. From the victim, Sharon Alexander.

Q. On what day?

A. The 29th of January, 1971.

Q. That is a copy of your report, is that right?

A. Right.

Q. And does it accurately reflect the information that Sharon Alexander gave you?

A. Yes, it does.

Q. After you prepared that report, the original of that report, what did you do with it?

A. I handed it to a supervising sergeant.

Q. Where at?

A. At the police station.

Q. Where was that located?

[12] A. Located at the time at 4001 West Fillmore.

Q. Thank you.

MR. MCKOSKI: Your Honor, no further questions.

CROSS-EXAMINATION

* * *

By MR. FLAXMAN:

Q. Respondent's Exhibit 1 is the report that you filled out after your interview with Sharon Alexander, is that correct?

A. That's correct.

Q. And in that report you put down everything that she had told you, is that correct?

A. Basically, yes.

* * *

[13] Q. Sharon Alexander did not tell you anything other than what you have related in Court today, is that correct?

A. Basically, yes.

Q. Okay. Now when you interviewed Miss Alexander you asked her to tell you about how tall the offenders were, isn't that correct?

A. No.

Q. You asked her the weight, approximate weight of the offenders?

A. No.
Q. But you did ask her to describe the offenders?
A. Yes.
Q. And she told you that one offender—both offenders were male Negroes, both wearing brown jackets, both in their late teens, one had a dark complexion and one had a light complexion, is that correct?
A. That's correct.
Q. She didn't tell you anything else?
A. No.
Q. And you didn't ask her about how tall either of the offenders were?

[14] MR. MCKOSKI: Objection, your Honor; that has already been asked.
THE COURT: I will permit the question.

By MR. FLAXMAN:

Q. And you didn't ask her about how tall either of the offenders were?
A. I asked her to describe them and the whole works.
Q. And she gave the descriptions I just read to you, and you asked her no further questions as to any description of the two offenders?
A. No.
Q. I'm not sure. The question was—you asked her no further questions to narrow the descriptions of the two offenders, is that correct?
A. That's correct.
Q. She didn't say she knew either of the attackers, did she?
A. She said she might possibly know them.
Q. So you are not—all right, did she tell you anything else?
A. Not that I can recall.
Q. You didn't pursue that question, when she said she might possibly know one of the offenders, is that correct?
A. No, I did not pursue it.
[15] Q. You did not write that down in your report, did you?
A. No.

MR. FLAXMAN: I have no further questions.

(Witness excused.)

MR. MCKOSKI: Your Honor, respondent will next call Stan Thomas.

* * *

DIRECT EXAMINATION

By MR. MCKOSKI:

Q. Mr. Thomas, spell your last name, please?
A. Stan, S-t-a-n, Thomas, T-h-o-m-a-s.
Q. And your occupation, Mr. Thomas?
A. Police officer assigned to the City of Chicago Area 4 Homicide as an Investigator.
Q. How long have you been assigned there?
A. I am in my seventh year now.
Q. On January 29, 1971 was that your same assignment?
A. Yes, sir.
[16] Q. On January 29, 1971 did you receive an assignment to interview a Sharon Alexander?
A. Yes, sir.
Q. Was anybody assigned along with you?
A. I don't recall at this point whether there was anybody with me at that time or not.
Q. After you received your assignment where did you go to?
A. I proceeded to the Cook County Hospital.
Q. In Chicago?
A. Yes, sir.
Q. Do you recall, if you recall what time was it, approximately?
A. Approximately 9:30 p.m. at night.
Q. Did you see Sharon Alexander when you arrived there?
A. Yes, sir.
Q. Where was she at?
A. She was in the examination area of the Cook County Hospital.
Q. Was anyone there with her when you arrived?
A. Yes, sir, her mother.
Q. Do you recall her mother's name?
A. Annette, I believe.
Q. At that time and place did you have a conversation [17] with Sharon Alexander?
A. Yes, sir.

Q. Was there anybody else present besides the people you have already listed?

A. No, sir.

Q. Would you tell us please what you said to Sharon Alexander and what Sharon Alexander said to you?

A. Well, I identified myself to her as a police officer assigned to make the investigation of her complaint, and I identified myself to her mother who was present during the course of this interview.

I had asked her at this point would she relate to me what had occurred to her.

Q. What did she say?

A. At this point—she was emotionally disturbed at this point, but she became a little relaxed after a few minutes and she related to me that she had been shopping in the area of Madison and Pulaski and she had been on her way home, that she was on Pulaski Road, southbound, towards her home when she was approached by two male Negroes, one who she knew to be a Browder, and she knew the sister of this person.

Q. When you say "knew him as a Browder" do you mean his name?

A. She described him as Browder, his last name being [18] Browder. She knew the sister, that the sister lived and the brothers lived in the 4000 block of Monroe, and that the second man with this person was unknown to her, a male Negro about seventeen who was lighter in complexion.

That she was approached by these two persons and the one that was unknown to her had asked her for her money, and when she refused she was slapped in the face by the unknown male Negro.

That these two subjects then fled from the scene.

Q. Did she relate anything further?

A. She continued on her way home and she got to Van Buren Street, which is the street she lives on, and she proceeded to go eastbound and at approximately 3922 West Van Buren Street she was approached by the same two subjects, Browder and this unknown male Negro, light-complected, and dragged into the gangway, to the rear of the gangway at 3922 West Van Buren.

At this point her money was taken from her, I believe it was $3.00, and she was knocked to the ground and that this Browder subject then forced her to have sexual relationships, relationship with her, and after he completed the act that the unknown male Negro forced her to have sexual relationships.

When they were both finished the subject [19] Browder, who was armed with a gun, threatened her that if she told anyone he would kill her, and that these two subjects then fled through the alley.

She at this time picked herself up off the ground and ran to her house, which was 3904 West Van Buren Street.

Q. In Chicago?

A. In Chicago, yes, sir.

She related what occured to her to her mother, who in turn called the police who arrived to take the report.

Q. Did you ask Sharon Alexander how old she was?

A. Sharon Alexander was 15 years of age at the time.

Q. Do you recall that you had further conversation with Sharon Alexander at the hospital, other than what you have already related?

A. Mainly it dealt with the fact of whether or not she would be able to identify the subject, where I could get ahold of her if the subject was apprehended.

Just pertinent information with regard to her accessibility in the course of this investigation.

Q. Besides that was there any further conversation if you recall?

A. Not that I recall at this time.

Q. After you talked with Sharon Alexander, [20] subsequent to that time, did you have occasion to have a conversation with a Martin Conroy?

A. Yes.

Q. Do you know Martin Conroy?

A. Yes, sir.

Q. Do you know where he is employed?

A. Martin Conroy is a police officer assigned as a Youth Officer. At the time in 1971 we were in the same station, and he was assigned to the Youth Division Section of Maxwell Street.

Q. Do you recall the date that you had the conversation with him?

A. It was, I believe, the 31st of January, 1971.

Q. Do you have any recollection as to the time?

A. No. It was sometime prior to our roll call, which would be sometime prior to 4:00 o'clock in the afternoon.

Q. Where did you see him at?
A. At the Maxwell Street Unit.
Q. And you had a conversation with him at that time?
A. Yes, sir.
Q. Do you recall if there was anyone else present besides you and Mr. Conroy?
A. I believe there was another officer present there.
There was various other officers right in [21] that area, but I don't recall if his partner was there at the time or not.
I had gone to Officer Conroy because of the——

MR. FLAXMAN: I object to the answer going beyond what was asked in the question, and I ask that the witness be instructed to confine his responses to the question.
THE COURT: Well all witnesses should confine themselves in responses to the questions asked, but I will permit the answer to stand in this case.

By MR. McKOSKI:

Q. Mr. Thomas, just so there is no confusion, do you recall the name of any other person who was present at this conversation?
A. Not at this time.
Q. Could you please relate—well first let me ask you what did the conversation concern that you had with Mr. Conroy?
A. I had gone to Officer Conroy to explain to him the fact I had a rape case and that I had the—in the course of my interview with the victim she related to me that one of the subjects was a Browder, about 17 years of age, who lived in the 4000 block of West Monroe Street, and I went there to enlist the aid of Officer Conroy in possibly locating the suspect.
[22] Q. Could you tell us to the best of your recollection what you told Mr. Conroy at that time?
A. Well, I told him about the rape and the fact that this 15-year-old girl had been raped.
Q. Did you mention her name?
A. I don't recall at this point whether or not I did.
Q. Okay, go ahead.
A. And I related to him that one of the subjects was a male Negro about 17 by the name of Browder who lived in the 4000 block of West Monroe.
That the second subject was a male Negro, 17 years of age, lighter—light-complected and unknown to the victim.

I asked him if there was anything that he could come up with in regard to this investigation.
Q. What did he say?
A. He related something to the effect that he knew something of a Browder family living in the 4000 block of West Monroe Street, and that he would attempt to make an investigation and locate any of the Browder children.
Q. Did you give Mr. Conroy at this time any more information concerning the rape of Sharon Alexander that you recall?
A. I don't recall at this point.

MR. McKOSKI: No further questions, your Honor.
[23] THE COURT: Mr. Flaxman.

CROSS-EXAMINATION

By MR. FLAXMAN:

Q. How long have you been a police officer?
A. I am in my thirteenth year right now.
Q. So in 1971 you were in your eighth year, is that correct?
A. Eighth or ninth year, yes.
Q. And what was your rank at that time?
A. Investigator.
Q. How long had you been an Investigator?
A. Since 1969.
Q. Did you get any training before you became an investigator with respect to interviewing witnesses?
A. I had a 30-day training period when I left patrol and prior to becoming a detective.
Q. And one of the things you learned in that 30-day period was that when you interviewed a person after a crime you try to get a description of the offender?

MR. McKOSKI: Your Honor, I am going to object to this. I can't see any relevance of what this witness learned. It is what he did that is important.
THE COURT: I will permit the question.
MR. FLAXMAN: Thank you.

[24] By THE WITNESS:
A. Yes.

By MR. FLAXMAN:

Q. You testified on January 29, 1971 that you had a con-

versation with Sharon Alexander at the Cook County Hospital?

A. Yes.

Q. Sometime after that conversation you prepared a report setting out the substance of that conversation, is that correct?

A. Yes.

Q. Do you recall when you prepared that report?

A. I believe it was the first of February, 1971.

Q. So it was a few days after the conversation?

A. Yes, sir.

Q. And prior to testifying here in Court today you had a conversation to look over that report, isn't that correct?

A. Yes, sir.

Q. And everything that Sharon Alexander told you in that conversation with her was put down in the report, is that correct?

A. To the best of my recollection it is.

Q. And you have related to us in Court everything that Sharon Alexander said to you in that conversation, [25] is that also correct, sir?

A. As far as I can recall.

Q. Isn't it true that she didn't give you an approximate height and weight of the two offenders?

A. I don't recall if she had or she had not.

Q. You asked her about how tall the offenders were, didn't you?

A. I would have, I probably would have, yes.

• • •

Q. You asked her about how—the approximate weight of the offenders, is that correct?

A. I would have.

• • •

[26] Q. In other cases when you interview witnesses you ask them the approximate height and weight of the offenders, is that correct?

A. It would—yes, I do ask that question, yes.

Q. And when they tell you what the approximate height and weight is you incorporate that into your report?

A. Not in all cases.

Q. In which cases don't you incorporate that into your report?

A. It would depend on whether or not after I have interviewed them and the subject is taken into custody, I would not go into a detailed description of that, because the subject is in custody.

If the subject was not in custody and wanted, then I would go into a detailed description.

[27] Q. On January 31 you had a conversation with Mr. Conroy, is that correct?

A. Yes, sir.

Q. And you related to him the substance of your conversation with Sharon Alexander on January 29?

A. Yes, sir.

Q. And Officer Conroy was the first other police officer that you had involved in this investigation, is that correct?

A. Yes, sir.

Q. Let's see, your testimony is that for two days you had the name of an offender and you did not act on it?

A. Will you repeat the question, please?

Q. All right, you got the name of a possible offender as being Browder in the 4000 block of West Monroe Street on January 29, is that correct?

A. Yes, sir.

Q. And the first action you took upon that information was on January 31?

A. On January 31 I had gone to seek the help of Officer Conroy.

Q. Officer Conroy was familiar with that neighborhood and with youth in that neighborhood, is that correct?

A. Yes.

Q. And you were not familiar with youth in that [28] neighborhood?

A. No, sir.

Q. Excuse me?

A. No, sir.

Q. So you waited two days to go to Officer Conroy for help?

A. No.

MR. MCKOSKI: Objection, your Honor. It has been asked and answered already.

THE COURT: I will permit the question and the answer to stand.

MR. FLAXMAN: Thank you.

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[29] Q. In your conversation with Officer Conroy on January 31 did you tell him the approximate height and weight of the two offenders described by Sharon Alexander?

A. I cannot recall if I did or didn't.

Q. Can you recall anything about the case that isn't in your reports?

A. That happened in 1971, and I can't recall the aspects of that investigation today.

• • •

Q. I would like to show you a document which has been marked as Petitioner's Exhibit 2 for identification, and I ask you to look at it, Officer.

A. This is my report.

Q. That is the report that you referred to previously as having been completed by you on about [30] February 1, 1971?

A. Yes, sir.

Q. And is this one of the reports that you examined prior to testifying here in Court today?

A. Yes, sir.

Q. Do you recall the first time that you had occasion to reexamine this report with respect to testifying in this cause?

A. It might have been about a month-and-a-half ago.

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Q. After rereading this report your recollection was refreshed about the events that you have testified about in Court here today, is that correct?

A. Yes, sir.

Q. And isn't it true that the only facts that you recall were those contained in the report?

A. Not all, but it did refresh my memory.

Q. But you cannot recall what Sharon Alexander [31] said to you when you asked her the approximate height and weight of the offenders?

MR. MCKOSKI: Objection, your Honor. It has been asked twice already.

THE COURT: I will sustain the objection.

MR. FLAXMAN: Just one further question:

By MR. FLAXMAN:

Q. This report was prepared after Mr. Browder had been arrested, is that correct?

A. Yes, sir.

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REDIRECT EXAMINATION

By MR. MCKOSKI:

Q. Mr. Thomas, I would like to hand you again [32] Petitioner's Exhibit 2 for identification which you have already identified as your report, is that correct?

A. Yes, sir.

Q. After looking at that report can you tell us now for sure, for certain, what date you prepared that report? I think you testified on direct examination it was about February 1.

A. It was exactly February 1, sir.

Q. And do you know what date the petitioner was arrested, taken into custody?

A. The 31st of January, 1971.

Q. So your report was prepared after he was arrested, is that correct?

A. Yes, sir.

Q. Your report was also prepared after the petitioner, Browder, had been identified by two witnesses, is that correct?

A. Yes, sir.

Q. So as a result you may have obtained the height, weight, other facts from Sharon Alexander and not included them in your report, because they weren't necessary, is that right? The man had already been identified?

MR. FLAXMAN: Objection, your Honor.

THE COURT: Sustained.

MR. MCKOSKI: I have no further questions, your Honor.

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[33] MR. MCKOSKI: Your Honor, we will next call Martin Conroy.

MARTIN CONROY,

DIRECT EXAMINATION

By MR. McKOSKI:

Q. Mr. Conroy, could you state your full name and spell your last name, please?

A. Youth Officer Martin Conroy, C-o-n-r-o-y.

Q. What is your occupation?

A. Juvenile Officer with the Chicago Police Department.

Q. How long have you been employed there?

A. I am in my tenth year.

Q. What is your present assignment?

A. Area 3 Youth.

Q. On January 31, 1971 what was your assignment then?

A. Youth Officer in Area 4.

[34] Q. That same day, Mr. Conroy, January 31, 1971, did you have occasion to have a conversation with a Stan Thomas concerning a rape?

A. Yes, sir, I did.

Q. Would you tell us where that conversation took place?

A. In the Area 4 Headquarters.

Q. Where is that located?

A. Maxwell and Morgan.

Q. In Chicago?

A. Yes, sir.

Q. If you recall what was the approximate time of the conversation?

A. I think it was about 4:30 in the afternoon.

Q. Was there anyone present that you recall besides yourself and Mr. Thomas?

A. I don't recall, sir.

Q. Will you please relate to us what you said to Mr. Thomas at that time and what he said to you?

A. Investigator Thomas told me that he had a rape that occurred on the 29th with a Sharon Alexander as a victim, and that she had the name of a Browder as the offender.

I asked him if he had a copy of the case report so I could look it over and I obtained a copy of the case [35] report.

Q. I should ask you too, do you know where Mr. Thomas, Stan Thomas, is employed?

A. He was an Investigator for Homicide with the Chicago Police Department.

Q. Mr. Conroy, you mentioned obtaining a police report.

I would like to show you now Respondent's Exhibit No. 1 for identification and ask you if you recognize that document?

A. Yes, sir.

Q. Could you tell us what it is?

A. It is a Crime versus Person Case Report, rape. The person, Sharon Alexander.

Q. Is that the report you retrieved?

A. Yes.

Q. Where did you get it from?

A. The files in Area 4.

Q. Respondent's Exhibit No. 1 for identification, is that the very same report that you withdrew from the records?

A. Yes, sir, it is.

Q. Now going back just a second to the conversation you had with Mr. Thomas at the Police Station, do you recall anything further that was said in that conversation?

A. The offender's name was Browder and he was a male Negro in his teens.

[36] Q. Do you recall any other conversation with him at that time?

A. I don't recall what was said, but we had some other words.

Q. After the conversation with Mr. Thomas did you do anything in connection with the name Browder that he had given you?

A. Yes, sir.

Q. What? Could you describe what exactly you did?

A. I went to the 11th District, the Fillmore Station at 4001 West Fillmore and I checked the Youth Files and came up with the name Browder and address of 4053 West Monroe, and the first name Tyrone, a 16-year-old male Negro.

Q. And again—I'm sorry.

A. I also had a phone number for that address.

Q. Could you tell us again, I'm not really clear on it, where or what type of files it was exactly that you obtained this Tyrone Browder's name?

A. Youth Division Headquarters files.

Q. Where is that located?

A. That's at 11th and State.

Q. What day was this?

A. It was on the 31st.

Q. After you obtained the name Tyrone Browder what did you do next if anything in regard to this investigation?
[37] A. I contacted the victim and spoke with her.
Q. Who was that?
A. Sharon Alexander.
Q. How did you contact her?
A. I went to her house.
Q. Do you recall where her house was, the general vicinity?
A. It was in the 3900 block of Van Buren, I think.
Q. Do you recall the time that you went over there?
A. Sometime between 4:30 when I found out about it and 5:00 o'clock, I don't know exactly.
Q. Did you go to her home with anyone else or by yourself?
A. I went with my partner, Frank O'Driscoll.
Q. Would you spell the last name?
A. O'-D-r-i-s-c-o-l-l.
Q. When you arrived at Sharon Alexander's residence what did you do?
A. I spoke with the victim and asked her what happened.
Q. What did she tell you?
A. She told me that she was raped by a boy known to her as Browder, and she knew this boy to be a Browder, because she said she went to school with a sister of his and that they lived in the 4000 block of West Monroe.
[38] Q. In Chicago?
A. Yes, sir.
Q. I should ask too, was her mother or anyone else present at this time?
A. Yes, sir, her mother was present.
Q. Do you know her first name?
A. No, sir, not offhand.
Q. Was there further conversation with Sharon Alexander at that time?
A. I asked her if she could identify him if I found him, and she said yes.
Q. Was there any discussion with regard to the other assailant that you recall?
A. No, sir, I don't recall.
Q. Do you recall anything else in that conversation?
A. No, sir.
Q. After you left Sharon Alexander's home what did you do next?

Strike that.
I want to ask and make sure, what was the date that you interviewed Sharon Alexander?
A. On the 31st of January, 1971.
Q. Okay, what did you do next in the investigation?
A. Went to the 3900 block of Adams. There was a fellow known to us there by the name of Little Man.
[39] Q. Was that his real name?
A. No, sir, that was his nickname.
Q. Do you know his real name?
A. No, sir, I do not.
Q. Do you know where he's at now?
A. I heard since that he was killed.
Q. Okay. What did you do then?
A. Well, my partner and I spoke to this fellow at the squad car and we asked him if he knew the name or the family Browder, and he said yes he did.
I asked him if he knew where he lived, and he said yes.
I asked him if he wouldn't point out the house, and he said he would. He accompanied us to 4053 West Monroe and pointed out the house.
Q. Did you have any other conversation with this person that you recall?
A. No, I can't recall anything more.
Q. What did you do next?
A. I went to the 11th District and contacted an assist car, Officers Toohey and Ahern, and we filled them in on the situation.
Q. And this was still the same day, January 31?
A. Yes, sir.
Q. All right. After talking with Officers Toohey [40] and Ahern what did you do next?
A. Proceed to 4053 West Monroe.
Q. Between the time you talked to Toohey and Ahern at the station and went to the home did you perform any other investigation between that time?
A. Yes, sir.
Q. What?
A. With the record check I called and spoke to a woman that said she was Tyrone Browder's mother.
Q. You called the number on the card, is that correct?
A. Yes, sir.
Q. When you called what happened?
A. I told her I was a Youth Officer investigating an

assault, and the girl said it was a teen-aged boy by the name of Browder and I had the name Tyrone on the record.

The mother responded if it was an assault on a girl it wouldn't be Tyrone, it would be Ben Earl, her other son.

I asked her if either or both of those boys were home, and she said they were both present.

I asked her if she would keep them home so I could come and talk with them.

Q. Who did you talk with over the phone?

A. Lucille Browder, the mother.

Q. Whose mother?

[41] A. The mother of Tyrone and Ben Earl.

Q. Was there further conversation over the phone with Lucille Browder?

A. I don't recall.

Q. Okay. After you talked to her then what happened?

A. Then we proceeded to 4053 West Monroe.

Q. And that was the same day, January 31, 1971?

A. Yes, sir, about 6:00 in the evening we got to the house.

Q. Who went to the house all together?

A. Myself, O'Driscoll, Toohey and Ahern.

Q. All police officers?

A. Yes, sir.

Q. Were you in uniform or plain clothes?

A. Civilian dress.

Q. That goes for all four officers?

A. Yes.

Q. When you arrived at the house what happened then?

A. I spoke to the mother and told her I was the officer that talked to her on the phone.

She invited us into the house, and indicated that Tyrone was there and Ben Earl was there, along with two other teen-aged boys.

Q. Do you know the names of the other teen-agers who were there?

[42] A. Not offhand. I could look at a report and remember. I think there was a Dale.

Q. Right now you don't recall the names of the other two black males?

A. No, sir.

Q. Could you describe the person who was introduced to you as Ben Earl Browder? How did he look at that time?

A. He was a male Negro, about 17 or 18, dark-complected.

Q. All right, what happened next inside the house?

A. I restated to the mother and to those present that I was investigating a rape and the investigation showed that it was a Browder, a teen-ager, and the girl could identify him.

Tyrone denied knowledge of it, and Ben Earl denied knowledge of it.

I told them they would have to go to the station and "see if the girl can recognize or identify you."

I suggested to the others present, they were about the same age and height, that if they came along it is possible that the victim wouldn't identify anyone, because there would be so many. I suggested if I brought one she would maybe point out one, and the other two fellows agreed to come along.

Q. What happened after that?

[43] A. Well——

Q. Was there further conversation in the house?

A. Before we left I said that "It's possible one of you will be identified, because there is supposed to be a second guy involved, besides a Browder," and I informed them of their Constitutional rights.

Q. Was there any further conversation that you recall at the house at that time?

A. Not that I can recall.

Q. What did you do next?

A. We proceeded to the 11th District.

Q. With who?

A. With Tyrone, Ben Earl and the other two.

Q. The other two male Negroes in the house?

A. Yes, sir. They were teen-agers. There were others present, but only four teen-agers.

Q. And at that time when you left with Ben Earl Browder and Tyrone Browder from their house they were under arrest, is that right?

A. Yes, sir.

Q. That same day, January 31, 1971 were you present when a line-up was conducted involving Ben Earl Browder?

MR. FLAXMAN: Objection to this, your Honor, as being beyond the scope of what the hearing is limited to, just probable cause.

[44] THE COURT: Mr. McKoski, where are you going with this?

MR. MCKOSKI: It is serving two purposes: Number one, I don't believe it is outside the scope of the hearing, because an argument can be made that even if there is no probable cause for an arrest when they were arrested the identification constituted probable cause.

Secondly, I think it is necessary for a logical progress of the evidence, what exactly happened.

THE COURT: All right, I will permit it.

MR. MCKOSKI: I will withdraw the question.

By MR. MCKOSKI:

Q. Mr. Conroy, were you present when a line-up was conducted where Ben Earl Browder participated?

A. Yes, sir.

Q. Where was that line-up conducted?

A. At the 11th District.

Q. On what day?

A. On the 31st.

Q. Do you remember about what time?

A. Sometime after the arrest, sometime after 6:00 o'clock in the evening.

Q. Do you recall the time any more specifically? [45] Can you narrow it down any more than that?

A. About 7:00 o'clock. I don't remember though, exactly.

Q. Could you describe—first of all how many people participated in the line-up?

A. There were five that stood in line.

Q. Could you describe them generally?

A. Male Negroes in their teens, five foot seven to about five foot eleven.

Q. Do you know the names of any of the persons that stood in the line-up?

A. Tyrone Browder, Ben Earl Browder, Dale I think.

• • •

(Colloquy omitted)

• • •

[50] Q. Mr. Conroy, do you specifically recall the names of the other participants in the line-up besides the two Browders?

A. No, I do not.

Q. You testified there were five participants altogether, is that correct?

A. Yes.

Q. You viewed this line-up, is that correct?

A. Yes, I did.

Q. Were any persons brought into the police station and viewed the line-up?

A. Yes.

Q. Would you tell us their names?

A. Sharon Alexander was brought in.

Q. And who else?

A. A Johnson, Johnnie Mae Johnson.

Q. Did they view the line-up separately or together?

A. Separately.

Q. Did Sharon Alexander identify anyone in the line-up as the person who raped her?

A. Yes.

Q. Who did she identify?

A. Ben Earl Browder.

[51] Q. Did Johnnie Mae Johnson make any kind of identification concerning a rape involving her?

A. Yes, she did.

Q. Who did she identify?

A. Ben Earl Browder.

MR. MCKOSKI: Your Honor, I have no other questions.

At this point I would offer into evidence Respondent's Exhibit 1 for identification.

MR. FLAXMAN: No objection.

THE COURT: It may be received.

(Respondent's Exhibit 1 for identification was received in evidence.)

MR. MCKOSKI: I have no other questions, your Honor.

• • •

CROSS-EXAMINATION

By MR. FLAXMAN:

Q. After you arrested Mr. Browder, did you fill out a report?

A. (No response.)

Q. Do you understand the question?

A. Yes, I did. I think my partner did the actual typing out of the reports.

[52] Q. Did he consult with you on the information that was placed in that report?

A. Yes, sir.

Q. Did you look over that report when he completed it?

A. Yes, sir.

Q. And were all the facts that were stated in that report true?

A. Yes, sir.

Q. You testified that you interviewed Sharon Alexander and she advised you that she knew the name of one of her offenders as Browder, is that correct?

A. Yes, sir.

Q. And then, after you interviewed her you went back to the police station?

A. Yes, I think directly after interviewing her we went to find this Little Man.

Q. And later that night you arrested some people named Browder?

A. Yes, sir.

Q. And you arrested them to allow Sharon Alexander to view them?

MR. MCKOSKI: I will object to that, your Honor. The purpose for the arrest I cannot see as relevant at all.

MR. FLAXMAN: That goes to the exploitation of [53] the primary taint, to the conduct.

THE COURT: I will permit the officer to give his reason for the arrest.

THE WITNESS: Would you please repeat the question?

MR. FLAXMAN: Let me rephrase it:

By MR. FLAXMAN:

Q. When you went to the Browder residence that night you went there to arrest someone named Browder, is that correct?

A. A teen-aged Browder, like 15, 16, 17, 18.

Q. And what was the purpose of arresting the teen-aged Browder?

A. Because the victim, Sharon Alexander, had told me it was a teen-ager older than her, like 16, 17, 18, like that, and it was a Browder that lived on Monroe.

Q. And what was the purpose of making that arrest and taking the Browder into custody?

A. For rape.

Q. Well, was the purpose to bring him to the police station to allow him to be viewed by Miss Alexander?

MR. MCKOSKI: Your Honor, I am going to object again. The witness has now already stated the reason for the arrest.

THE COURT: He has stated a reason. If he has an [54] additional reason he may give it, but the reason has been stated. If he has another reason he may so state.

By MR. FLAXMAN:

Q. At the time you went to the Browder house you were investigating the rape of Sharon Alexander?

A. Yes.

Q. And in part of that investigation you wanted to determine which if any Browder had been involved in the offense, is that correct?

A. Yes, sir.

Q. And when you went to the Browder residence you spoke to two teen-aged brothers?

A. Yes, sir.

Q. And both of them told you that they had had nothing to do with the events in question?

A. Yes, sir.

Q. Okay. What did you do then?

A. I informed them that the victim had said that a teen-aged Browder had raped her and she could recognize the guy that did it.

Q. And then you arrested them and took them down so that they could be identified if possible?

A. Yes, sir.

Q. So that the purpose of your arrest was to bring [55] them to the police station so they could be placed in a line-up?

MR. MCKOSKI: I am going to object to this again, your Honor.

THE COURT: No, I am going to permit the question.

By MR. FLAXMAN:

Q. Shall I repeat the question?

A. Would you, please?

Q. All right: Isn't it true, sir, that the purpose behind

your arrest of the teen-aged Browders was to bring them down to the station to place them in a line-up?

A. To see if they could be identified by the victim. To see which one would be identified, yes, sir.

Q. At the time you arrested both Browders you didn't know which one, if either, would be the one who would be identified?

A. That is correct, sir.

Q. I would like you to look at a document marked Petitioner's Exhibit 3 and tell me what it purports to be?

A. This is a copy of a report, a supplemental report on the rape of Sharon Alexander.

Q. Was that the report that was prepared by your partner that you looked over and adopted as being true?

A. Yes, sir.

Q. Excuse me?

[56] A. Yes, sir.

MR. FLAXMAN: Thank you, I have no further questions, your Honor.

• • •

THE COURT: All right.

MR. FLAXMAN: Has that motion been denied?

THE COURT: The motion is taken under advisement.

MR. FLAXMAN: I have two exhibits that were marked which are two police reports. I believe this is a stipulation as to the genuineness of the documents.

MR. MCKOSKI: You are referring to Petitioner's Nos. 2 and 3?

MR. FLAXMAN: Yes.

MR. MCKOSKI: I have no objection to the authenticity of the documents or the foundation. I have objections as to relevancy and materiality.

MR. FLAXMAN: I move their admission into evidence.

[57] THE COURT: The Court will receive the exhibits into evidence. Do they carry numbers?

MR. FLAXMAN: Petitioner's Exhibits 2 and 3.

THE COURT: All right.

(Petitioner's Exhibits 2 and 3 were received in evidence.)

MR. MCKOSKI: Your Honor has ruled, but I would like to

make a very brief argument of why I think they are immaterial and irrelevant.

THE COURT: All right?

MR. MCKOSKI: The Petitioner's Exhibit 2 was prepared by Stan Thomas who testified here today. If there is something in Petitioner's Exhibit 2 that contradicted that testimony it should be brought out for impeachment.

This report on its own, I don't know if it contains contradictions or not, I don't think it does, but if it contains something that could be termed a contradiction it is improper, I would submit, for this Court to consider it because there has been no impeachment. Other than that the information, any information Stan Thomas had concerning this crime should have been brought out on the examination of him while he was here.

This report is like a hearsay document that has no proper reason that should be admitted. The witness didn't say he couldn't recall, this is certainly not past [58] recollection recorded or anything like that.

I really can't understand why this document, Petitioner's Exhibit 2, is being admitted. What purpose it will serve, it's a prior statement of a witness and I have the same objection to Petitioner's No. 3.

THE COURT: Mr. Flaxman?

MR. FLAXMAN: First I believe the officers testified, but the writings were used to refresh their recollection. Under 6-12 Rules of Evidence they are admissible.

The last officer testified that the writing was adopted by him, which I think makes it not hearsay under the Rules.

THE COURT: What is your position on relevance?

MR. FLAXMAN: Well, first relevancy isn't a question under 6-12, it's an absolute right to have it if it was used to refresh his recollection.

THE COURT: The Court will stand on the ruling that they may be admitted into evidence.

MR. FLAXMAN: We have two witnesses in rebuttal, your Honor.

THE COURT: All right.

(Whereupon the Petitioner presented the following evidence in rebuttal:)

[59] LUCILLE BROWDER,

DIRECT EXAMINATION:

By Mr. Flaxman:

Q. Would you state your name, please?
A. Lucille Browder.

• • •

Q. Are you related to the petitioner, Ben Earl Browder?
A. I am Ben's mother.
Q. Directing your attention to January of 1971, do you recall the day on which your son, Ben Earl and your son Tyrone were arrested?
A. Yes.
Q. Were you at home when they were arrested?
A. I was at home.
Q. Do you recall if you had any conversations with the police officers who came to arrest your sons?
A. Yes. I remember the police asked me, said that they had came for my sons, and I said, "What for," and it [60] seems like to me they said to take him down for questioning and they would bring them back.
Q. Do you remember the names of the police officers?
A. No, I don't remember the names.
Q. Was anything further said by the police officers to you?

Mr. McKoski: Your Honor, objection unless it is specified as to place.

By Mr. Flaxman:

Q. During that same conversation was anything further said to you by either of the police officers?
A. No, I know I asked him what for, and they said they was going to take them down for questioning and they would bring them back.
Q. Did they say who they wanted to arrest?
A. No, they didn't say especially no names.
Q. Did they tell you the offense for which they were——
A. No, I tried to get it out of them.
I said, "What for?" They said "People want to interview them, want to see them," or something like that, and they were going to bring them back and let them go.
They didn't tell me specificaally what they wanted them for down there.
[61] Q. Do you remember specifically they were told they were looking for Tyrone for the investigation of a rape?

A. I don't remember them calling Tyrone especially.
Q. Do you remember saying "It's probably not Tyrone, it sounds more like Ben"?
A. No, no.

Mr. McKoski: Your Honor, I object unless we are talking about the same time and place.

By Mr. Flaxman:

Q. During that conversation do you recall stating to either of the police officers that "It's probably not Tyrone who committed the crime, but Ben"?
A. No.
Q. Earlier that evening did you receive a phone call from a police officer?
A. No, I don't recall no phone call, really.

Mr. Flaxman: Thank you, I have no further questions.

Cross-examination

By Mr. McKoski:

Q. You have already testified you were Ben Earl Browder's mother, is that right?
A. Yes.
Q. And before your son, Ben Earl Browder went to [62] jail, went to prison, he lived with you, is that right?
A. Yes.
Q. He had lived with you about all his life?
A. Right.
Q. How long has he been in the penitentiary, do you know approximately?

• • •

A. I am thinking just about five years.
Q. And in your household you and the rest of your family have missed Ben Browder, haven't you?
A. Sure, because he's part of the family. We miss him.
Q. You would like to do anything you could to help him come back home?
A. Not anything. I would like to do something to help him, but not anything though.
[63] Q. Thank you very much.
Mrs. Browder, you said you didn't receive a phone call from any police on the evening that Ben Earl Browder was arrested, is that your testimony?

A. Yes.

Q. So you may have received a phone call or you may not have, is that right?

A. I don't remember receiving one. Maybe one came, but if it came for me they would have told me.

Q. I'm sorry, ma'am, I didn't hear?

A. I said if it had came for me the children would have told me. You know, if it came especially for me. I don't remember receiving one myself.

Q. What you are saying is you don't remember if you got a phone call or not that night?

A. No, no I don't remember.

MR. MCKOSKI: Thank you. No further questions, your Honor.

• • •

(Witness excused.)

[64] TYRONE BROWDER,

DIRECT EXAMINATION

By MR. FLAXMAN:

Q. State your name, please?

A. Tyrone Browder.

Q. Are you related to the petitioner, Ben Earl Browder?

A. Yes.

Q. And how are you related to him?

A. I am his brother.

• • •

Q. Directing your attention to January 31, 1971, do you recall being arrested on that day?

A. Yes.

Q. And do you recall where you were when you were arrested?

A. At home.

Q. And your brother was arrested with you?

A. Yes.

• • •

[65] Q. Okay, in your opinion what is your complexion?

A. My complexion now?

Q. Yes?

A. Brown skin.

Q. Is it dark brown skin or light brown?

A. Dark.

• • •

[66] Q. About how tall are you now, Mr. Browder?

A. Six foot two.

Q. Do you recall about how tall you were in 1971?

A. About an inch shorter.

Q. That would make you about six foot one.

A. Yes.

• • •

Q. Do you know the height of your brother?

A. Now?

Q. Yes?

A. About six foot one.

[67] Q. Do you know how tall your brother was in 1971?

A. No, I don't.

Q. Do you know if you were taller than him in 1971?

A. Yes.

• • •

MR. FLAXMAN: We have nothing further, Judge.

THE COURT: All right.

MR. FLAXMAN: At this time it is our position that there has been no new evidence brought forth that was not before the Court before when it entered its opinion, and found that Mr. Browder was arrested unlawfully.

There is testimony that they went to the house to arrest the teen-ager named Browder, and there happened to be two teen-agers named Browder, so they arrested them both.

As a matter of law they didn't have [68] probable cause to arrest but one.

THE COURT: Mr. McKoski?

MR. MCKOSKI: Your Honor, if it is my understanding that memoranda will be submitted, I will waive any kind of closing argument. I will present my closing argument in my memorandum if that's all right with the Court.

THE COURT: All right.

• • •

CRIME AGAINST PERSON CASE REPORT/CHICAGO POLICE 600

1. Offense: RAPE
2. Classification: FORCIBLE
3. Beat of unit assigned: 1134
4. Beat of occurrence: 1113
5. Address of occurrence: 3727 W. VAN BUREN
7. Date occurred: 29 JAN 71 | Time: 2015 | Date reporting officer arrived: 29 JAN 71 | Time: 2035 | No. of victims: 1
600 10. Victim's name: ALEXANDER, SHARON E. | Sex/race/Y.O.B.: FN 1956 | Home address: 3904 W. VAN BUREN | 12. Home phone: 722-6047 | 13. Business phone: NONE
14. Person reporting crime to police: VICTIM | 15. Home address: X | 16. Home phone: X | 17. Business phone: X
18. Parent or guardian of victim if juvenile: ALEXANDER ANNETTE 1934 | Sex/race: FN | 19. Home address: 3904 W. VANBUREN | 20. Home phone: 722-6047 | 21. Business phone: AN 3-[illegible]
600 22. Name of person who discovered body (homicides): DNA | 23. Home address: X | 24. Home phone: X | 25. Business phone: X
26. Witnesses' name: NONE AT THIS TIME | 27. Home address | 28. Home phone: X | 29. Business phone: X
30. Name of first officer at scene: DNA | 31. Time officer arrived: DNA | 32. How offender approached—entry—direction: ON STREET FACE TO FACE
33. Victim's occupation: STUDENT | 34. Exact location of victim on premises: DNA
35. Type of location where occurred: Res. other than public housing / Public housing / Street / School prop. / Park prop. / Railroad property / C.T.A. platform / C.T.A. vehicle / Tavern / [X] Other — Specify: ENTRANCE TO BASEMENT
36. Weapon, instrument or means of attack: SEXUALLY | 37. How means of attack used: X | 38. If victim hospitalized, state where: DNA
39. Nature of injuries and location on body: DNA
40. What did offenders say?: GIVE ME YOUR MONEY | 41. No. of offenders: 2 | Sex: M | Race: N | Age
42. Vehicle used by offenders: DNA
43. Name of detective or Y.D. notified: MASCULINE | Time: 2035 | 44. Name of coroner notified: DNA | Time
45. Photographs taken by: DNA | Time | 46. Person in charge at scene: DNA | Time arrived | 47. Inventory number: DNA
48. Narrative: (Give description of how crime was committed. If complaint is unfounded, explain why.)

B-1134 SENT TO 3904 W. VAN BUREN BY CC TO INVESTIGATE A RAPE VICTIM, ON ARRIVAL INTERVIEWED VICTIM ALEXANDER, SHARON E. F/N 1956 WHO STATED THAT SHE WAS WALKING EAST ON VANBUREN AT 3933 WEST WHERE SHE WAS APPROACHED BY TWO COLORED MALES WHO STATED TO HER "GIVE ME YOUR MONEY" THEN ONE OFFENDER PUT HIS HAND OVER HER MOUTH AND BOTH FORCED HER TO THE REAR ENTRANCE TO A BASEMENT AT 3933 W. VAN-BUREN WHERE SHE WAS ATTACKED BY

[X] Continued on reverse side | Vehicle or trailer stolen: [ ] Yes [X] No

49. Extra copies required: MAL | 50. Date investigation completed: 29 JAN 71 | Time: 2205 | R. [illegible] 1115
Name: [illegible] | 52. Reporting officer: N. HLADCUK 4216 | 29 JAN 71 2355

K 051-211

CONTINUATION OF NARRATIVE

OFFENDERS AND TOLD HER IF SHE TELLS SHE WOULD BE KILLED.
OFFENDERS DES. AS. #1 M/N DARK COMPLEXION WEARING A BRO. JACKET.
NO. 2 M/N LIGHT COMPLEXION ALSO WEARING A BRO. JACKET, BOTH IN LATE TEENS.
VICTIM WITH HER MOTHER TRANSPORTED TO CCH.
ALL NOTIFICATIONS WERE MADE.

NO. 12

JAN 30 12 30 '71

K 037289

PETITIONER'S EXHIBIT 2

SUPPLEMENTARY REPORT/ CHICAGO POLICE

1. Offense/Classification on last previous report	2. Offense/Classification as of this date (if same as no. 1, write "dna")	3. Beat or unit assigned	4. Beat of occurrence
RAPE/FORCIBLE	dna	644	III6

5. Victim's name as shown on case report	Corrected?	Correct name	7. Victim's address	Phone no.
ALEXANDER, Sharon E.	No X Yes ☐		3904 W. Van Buren 2nd	722-0037

8. Date of this report	9. Date reporting off. arr. original case	Time	10. Type of location where offense occurred (refer to case report)
I Feb I97I	29 Jan 71	2005	Gangway

11. If robbery, is it a chain store? 1 ☐ Yes 2 ☐ No — 12. If burglary, time — Address of occurrence: 3922 W. Van Buren St.

Fill in the full amount of only those values which either differ from or were not reported on the original case report or the last previous supplementary report.

	Money	Jewelry	Furs	Clothing	Other (Specify)
13. Property taken	☐ $	☐ $	☐ $	☐ $	☐ $
14. Property recovered	☐ $	☐ $	☐ $	☐ $	☐ $

15. Status: Cld. X — 16. Is further police action reqd.? ☐ Yes X No — 17. If case is cleared, how cleared? X Arrest & prosc. ☐ Directed to family ct. ☐ Compl. refused to prosecute ☐ Community adjustment ☐ Other exceptional

18. Multiple clearances — List all multiple clearances in the boxes provided and extend the list below if necessary, start the narrative section of the report immediately following the multiple clear-up list

R.D. No.	Beat of Occ.	Offense (Give the offense/classification of last report)	Cleared by Arrest	Cleared Exceptional: Refused to prosecute	Offender admitted to crime	Other (specify in narr.)	Code (leave blank)
K 038 570	III2	RAPE/FORCIBLE	XXX				

19. Narrative

VICTIM:	ALEXANDER, Sharon E. F/N/I5 dob. 6 Jan I956 3904 W. Van Buren 2nd, phone # 722-0037 Student at Roosevelt Highschool 3436 W. Wilcox
~~IN CUSTODY:~~	~~BROWDER, Ben E. M/N/I7 dob. 24 Mar I953~~ 4053 W. Monroe St. Ist 638-3052 SS#342-46-378I ~~IR#289413 CB#3I98690 AKA "BEN EARL".~~
OFFENSE:	Rape/Forcible
DATE & TIME:	29 Jan I97I @ I935 hours.
LOCATION:	Gangway 3922 W. Van Buren St.
MANNER:	Victim grabbed by offender and forced into gangway.
MOTIVE:	Sexual gratification and robbery.
WEAPON:	Gun, not recovered.
~~VICTIM TAKEN TO:~~	~~Cook County hospital by MB II29~~

X Continued on reverse side

20. Enter central booking (CB) number or juvenile district adjustment (JDA) number of all persons taken into custody for this offense(s) and district or unit number of the arresting officer.

C.B. No. or J.D.A. No.	Arrest. Dist.	C.B. No. or J.D.A. No.	Arrest. Dist.	C.B. No. or J.D.A. No.	Arrest. Dist.	C.B. No. or J.D.A. No.	Arrest. Dist.
3198690	084						

EXTRA COPY FORWARDED

21. Extra copies required: YD - 2 copies — 22. Date investigation completed: I Feb 7I — 23. Supervisor approving: Sgt. Galty 1153 — Date: 2 2 71 — Time: 1700

Reporting officer: Inv. Stan Thomas — Star no. 9737 — 24. Reporting officer signature: Stan Thomas

K 037289

2

RAPE/FORCIBLE 644 III6
ALEXANDER, Sharon E. 3904 W. Van Buren 2nd - 722-0037
CONT'

ARRESTING OFFICERS: Inv. M. Conroy #I2566 YD# 4, Inv. J. Toughey #4738 YD# 4, Inv. F. Discoll #9526 YD# 4, Inv. C. Ahern #6556 YD# 4.

CHARGES/DATE/BR: Rape, (2 counts), Armed Robbery, Theft, set for branch #43, on 26 Feb I97I. Bond set at $I0,000 USC.

EVIDENCE INVENTORIED: Photographs of show-up held at the OIIth dist. by ET 2357 on 3I Jan I97I.

INVESTIGATION: The undersigned officer assigned to investigate a rape victim at the CCH on 29 Jan I97I at 2I30 hrs. by Sgt. Broderson. On arrival at the hospital the victim was identified as Sharon Alexander, and in an interview with her with her mother Annette Alexander present the following was learned.

The victim Sharon stated that she had just left the area of Madison and Pulaski after shopping and was on her way home, South on Pulaski when she first observed the two offenders, one of whom she knew as BROWDER, as she knew his sister, and that he lived in the 4000 block of W. Monroe St.. The second she did not know and was only able to give an identification of his being a M/N, I7 light complexion and wearing a brown jacket.

She stated that the offenders approached and the unknown M/N slapped her in the face after asking her for her money. Both of the offenders fled and that she continued on her way home. She said that she was in the 3900 block of Van Buren St. at about3922 west when the same two offenders grabbed her and forced her into the gangway, searched her and took $3.00 USC from her pocket and then threw her on the ground where she was forced to have sex relations with the subject BROWDER first and then the unknown M/N. She stated that BROWDER threaten her with a gun, and told her that they would kill her if she were to tell anyone. She said that upon the offenders finishing, they fled thru the alley and that she ran home and called the police.

Victim taken to the CCH by MB II29, Off. Hladzuk #III2 & Co. Victim examined by Dr. Gray and was negative for sperm and Trauma. With the information supplied by the victim, the undersigned officer contacted and enlisted the aid of Youth officer M. Conroy relative to his knowledge of the teens and gangs the hang in the area of Pulaski and Monroe St.. Officer Conroy advised that he knew of a BROWDER family that lived at 4053 W. Monroe St. and that he would attempt to locate one of the sons about I7 years old. On 3I Jan I97I, the undersigned officer contacted by Off Conroy and advised that he had contacted the family and spoke to the mother Mrs. Lucille Browder. He advised her of the circumstances and she reported that only one of her sons seemed possible of such a thing and identified him as Ben E. Browder. Officer Conroy stated that he had brought Ben E. Browder and his brother Tyrone Browder into the OIIth dist and had contacted the victim Sharon Alexander to appear in the dist. for a show-up.

SEX CARD

The undersigned also advised by Off Conroy, that Off. Wm. James #2775 of the OII th dist. had observed the subject Ben E. Browder and noted that he fitted the description of [illegible] cast on his right wrist and that was wanted for a rape committed on 30 Jan I97I at 4I43 W. Adams St.. Officer Conroy stated that he checked this out and found that a rape was committed at 4I43 W. Adams St. on 30 Jan I97I at I745 hours. RD# K 038570, Victim a Johnnie Mae Johnson F/N/I? of 4I44 W. Adams St.. Discription of offender was a M/N/I7, wearing a cast on the right

BEST COPY AVAILABLE

3

RAPE/FORCIBLE 644 III6
ALEXANDER, Sharon E. 3904 W. Van Buren 2nd - 722-0037

CONT'

ET #2357 assigned to take photographs of the line-up at the OII dist. Subjects used in the line-up were as follows. LEFT to RIGHT

#I	BROWDER, Tyrone	M/N	dob. 3I May 1954	of 4053 W. Monroe St.
#2	POLK, Stanley	M/N	dob. 5 Mar 1954	of 40I0 W. Monroe St.
#3	BROWDER, Ben E.	M/N	dob. 24 Mar 1953	of 4053 W. Monroe St. (SUSPECT)
#4	DALE, Milton	M/N	dob. 29 Aug 1950	of 4459 W. Madison St.
#5	LOVE, N[illegible]son	M/N	dob. I6 May 1953	of 5439 W. Adams St.

Both of the victims appeared at the dist. station and viewed the line-up separately and positively identified the subject Ben E. Browder as the offender who had raped them. In addition, the mother of Sharon Alexander upon seeing Ben E. Browder in the line-up, identified him as the person who stole her purse on 2I Jan I97I. Rd# K 026509.

The subject Ben E. Browder had been advised of his constitutional rights in it's entire and made an oral admission to the rape of Johnnie Mae Johnson.

The victim Johnnie Mae Johnson was interviewed by the undersigned officer and related that on 30 Jan I97I @ I745 hours she was coming home from the store and was on Adams St. just East of Keeler, when she was grabbed from behind by a M/N/I7 who was armed with a gun. She stated that the offender, now identified as Ben E. Browder hit her over the head with the gun and called her a "BITCH", and told her not to look at him. She said that this offender forced her to walk into the gangway to the rear of 4I48 W. Adams St. and into a basement. He then forced her to take off her pants and lie on a matress that was lying on the floor. She said that she was forced to have sex relations with the offender and that when he was finished he asked her for her money and then took $I.90 USC, a quanity of bus tokens and a yellow watch witch belonged to her boyfriend. She stated that he then took her out of the basement to the alley and then left her. She stated that she then went home and called the police and was taken to the hospital, CCH by Ib III4 were tests conducted by Dr. Kaji revealed victim positive for sperm and Trauma.

Browder was charged with two (2) counts of rape and one of Armed robbery and one of theft. He appeared in holiday court on I Feb I97I and was continued to Branch #43 on 26 Feb I97I, Bond set at $I0,000.

It is recommended by the undersigned officer that this case (K 037289) and (K 038570) be CLEARED.

REPORT OF: Inv. Stan T[illegible]ns #9737 H/S 4 CID.

NC. T2

CLEARED

HOMICIDE 4

71 FEB 2 20:09

K 037289

SUPPLEMENTARY REPORT/ CHICAGO POLICE — Petitioner's Exhibit 3

1. OFFENSE/CLASSIFICATION ON LAST PREVIOUS REPORT: RAPE
2. OFFENSE/CLASSIFICATION AS OF THIS DATE: FORCIBLE
3. BEAT OR UNIT ASSIGNED: 8413
4. BEAT OF OCCURRENCE: 1113

6. VICTIM'S NAME AS SHOWN ON CASE REPORT: ALEXANDER, SHARONE F/N 58 — CORRECT? YES
CORRECT NAME: DNA
7. VICTIM'S ADDRESS: 3904 W. VanBuren — PHONE NO.: 722-00

8. DATE OF THIS REPORT: 31 Jan 1971
9. DATE REPORTING OFF. ARR. ORIGINAL CASE: 29 1 71 — TIME: 2005
10. TYPE OF LOCATION WHERE OFFENSE OCCURRED: DNA

11. IF ROBBERY, IS IT A CHAIN STORE? YES DNA NO
12. IF BURGLARY, TIME: DNA
ADDRESS OF OCCURRENCE: DNA

FILL IN THE FULL AMOUNT OF ONLY THOSE VALUES WHICH EITHER DIFFER FROM OR WERE NOT REPORTED ON THE ORIGINAL CASE REPORT OR THE LAST PREVIOUS SUPPLEMENTARY REPORT.

	MONEY	JEWELRY	FURS	CLOTHING	OTHER (SPECIFY)
13. PROPERTY TAKEN	DNA	$	$	$	$
14. PROPERTY RECOVERED	$ DNA	$	$	$	$

15. STATUS: CLR. UNFD. SUSP. EX.
16. IS FURTHER POLICE ACTION REQUIRED? [X] YES NO
17. IF CASE IS CLEARED, HOW CLEARED: [X] ARREST & PROSC. / DIRECTED TO FAMILY CT. / COMPL. REFUSED TO PROSECUTE / COMMUNITY ADJUSTMENT / OTHER EXCEPTIONAL

18. MULTIPLE CLEARANCES

R.D. NO.	BEAT OF OCC.	OFFENSE (GIVE THE OFFENSE/CLASSIFICATION OF LAST REPORT)	CLEARED BY ARREST	CLEARED EXCEPTIONAL: REFUSED TO PROSECUTE	OFFENDER ADMITTED TO CRIME	OTHER (SPECIFY IN NARR.)	CODE (LEAVE BLANK)
DNA							

19. NARRATIVE

ON VIEW ARREST BY AREA 4 YOUTH DIVISION CARS 8413 & 8414

SUPPLEMENTARY REPORT # 1.

COMPLAINANT: Annette Alexander F/N 1936 of 3904 W. VanBruen. 722-0037

PERSONS ARRESTED: #1. BROWDER, BEN M/N 1953 of 4053 W. Monroe St.
#2. BROWDER, TYRONE M/N 1954 of 4053 W. Monroe St.
#3. POLK, STANLEY M/N 1954 of 4020 W. Monroe St.
#4. DALE, MILTON M/N 1950 of 4459 W. Madison St.

CHARGES: Chapter 38, Section 11-1 RAPE

ARRESTING OFFICERS: F. O'Driscoll 9526, M. Conroy 12566, J. Toughey 473[illegible]
C. Ahern 6556.

NARRATIVE: The reporting officers received information from a known informer that the boy's that rape a girl at 3922 W. VanBuren were known by the above names. The officers checked with Area 4 HCS

[X] CONTINUED ON REVERSE SIDE

20. ENTER CENTRAL BOOKING (CB) NUMBER OR JUVENILE DISTRICT ADJUSTMENT (JDA) NUMBER OF ALL PERSONS TAKEN INTO CUSTODY FOR THIS OFFENSE(S) AND DISTRICT OR UNIT NUMBER OF THE ARRESTING OFFICER.

C.B. NO. OR J.D.A. NO.	ARRESTING DIST. OR UNIT NO.	C.B. NO. OR J.D.A. NO.	ARRESTING DIST. OR UNIT NO.	C.B. NO. OR J.D.A. NO.	ARRESTING DIST. OR UNIT NO.	C.B. NO. OR J.D.A. NO.	ARRESTING DIST. OR UNIT NO.
			14				

21. EXTRA COPIES REQUIRED: 148, 074, 011
22. DATE INVESTIGATION COMPLETED: 31 Jan 1971 — TIME: 2230
SUPERVISOR APPROVING: [signature] — STAR NO. 1052
23. REPORTING OFFICER: F. O'Driscoll — STAR NO. 9526
24. REPORTING OFFICER: M. Conroy — STAR NO. 12566
DATE: 1 Feb 71 — TIME: 0[illegible]

(629)

K- 037289

CPD-11.111(REV.7/70)

SION OF NARRATIVE

and obtained copy's of the case report. After checking with the victim the office received addictional information as to the discription of the offenders. The officers went to 4053 W. Monroe St. and interviewed Ben Browder M/N 1953 who fit the discription of the offender. While at the Browder home the officers met the above three M/N who volunteered to stand the Show-up that was conducted at the 11th. Dist. All the offenders where then taken to the 11th. Dist., and informed of there constitutional rights. The victims of the crimes where contacted and came into the 11th. Dist. to view the show-up. The show-up was held in the squad room of the district. After the show-up the victims identified BROWDER, BEN M/N 1953 as the offender of the rape. The crime lab was contacted and ET Kubach took a photo of the show-up. The Area H&S unit was notified and Inv. Thomas arrived at the dist. and preparred charges against the offender. Complaints were signed by the victim and the offender was booked for Br. 43 The above case to cleared by Area 4 H&S reports.

IDENCE REPORT # 1922

TIME INVESTIGATION STARTED: 1800 Hrs.
TIME INVESTIGATION ENDED: 2230 Hrs.
TOTAL TIME: 2½ Hrs.

K- 032289

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(TITLE OMITTED IN PRINTING)

ORDER

Following an evidentiary hearing and further argument by the parties the court finds that the writ of habeas corpus was properly issued on October 21, 1975. The motion to reconsider is therefore DENIED. Accordingly, the writ shall issue with execution stayed for five days pending prompt filing of notice of appeal and application to the Court of Appeals for a further stay. The court further finds that petitioner's request for fees pursuant to 28 U.S.C. § 1937 is not justified and is hereby DENIED.

DATED: January 26, 1976

/s/ Joel M. Flaum

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(TITLE OMITTED IN PRINTING)

NOTICE OF APPEAL

Notice is hereby given that respondent, above named, by his attorney, WILLIAM J. SCOTT, Attorney General of the State of Illinois, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the orders issuing a writ of habeas corpus entered in this action, October 21, 1975 and January 26, 1976.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General
State of Illinois

By: /s/ Raymond McKoski
Assistant Attorney General
188 West Randolph St. (2200)
Chicago, Illinois 60601
(312) 793-2570

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

January 30, 1976

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*

UNITED STATES OF AMERICA, ex rel. BEN EARL BROWDER, *Petitioner-Appellee,* vs. DIRECTOR, DEPARTMENT OF CORRECTIONS, State of Illinois, *Respondent-Appellant.*	No. 76-1089 (75 C 69)

This matter comes before the court on the "Emergency Motion To Stay Execution Of Writ Of Habeas Corpus Pending Appeal" filed herein on January 28, 1976 by counsel for the respondent-appellant. On consideration whereof, this Court being fully advised in the premises,

IT IS ORDERED that said emergency motion be, and the same is hereby, DENIED. This appeal will, however, be expedited in accordance with the following schedule:

• • •

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued February 27, 1976

April 28, 1976.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM E. STECKLER, *Chief District Judge*•

(TITLE OMITTED IN PRINTING)

ORDER

The respondent-appellant, Director of the Department of Corrections of the State of Illinois, appeals from an order of the District Court for the Northern District of Illinois granting the issuance of a writ of habeas corpus.

Petitioner-appellee, Ben Earl Browder, was convicted by a jury in the Cook County Circuit Court on August 27, 1971, for the rape of one Johnie Mae Johnson. He was sentenced to a term of not less than four nor more than fifteen years in the Illinois State Penitentiary. The conviction was affirmed by the Illinois Appellate [2] Court for the First District, the court holding that since the propriety of his arrest was not raised in the trial court it could not be raised on appeal. *People v. Browder,* 13 Ill. App.3d 198, 300 N.E.2d 511 (1st Dist. 1973) (abstract only). Review was denied without opinion by the Illinois Supreme Court. *People v. Browder,* Cause No. 46103 (November 29, 1973). Petitioner's post-conviction petition alleging that he was denied the effective assistance of counsel and of his constitutional right to counsel at his line-up identification was also dismissed. The dismissal was affirmed by the Illinois Appellate Court. *People v. Browder,* 29 Ill. App.3d 596, 331 N.E.2d 162 (1st Dist. 1975) (abstract only).

• Honorable William E. Steckler, Chief Judge for the Southern District of Indiana, is sitting by designation.

The petition for writ of habeas corpus was filed in the district court alleging that there was no probable cause for petitioner's arrest. In response respondent filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). This motion was denied on October 21, 1975, with the district court issuing the writ of habeas corpus, staying execution of the writ for sixty days. On November 18, 1975, respondent filed a motion to conduct an evidentiary hearing as to whether or not there was probable cause for petitioner's arrest. The motion was granted along with a motion to further stay execution of the writ and an evidentiary hearing was held on January 7, 1976, as to whether probable cause for the arrest was present. On January 26, 1976, the court ordered the writ to issue with execution stayed for five days. Notice of appeal was filed on January 27, 1976. After this court denied a further stay of execution the writ issued on January 30, 1976.

[3] At the evidentiary hearing petitioner submitted into evidence the state court record and rested his case. Respondent introduced testimony of investigating police officers in support of probable cause for the arrest. These officers testified that on January 29, 1971, Sharon Alexander reported that she was raped in Chicago, Illinois. She described the assailants to James Newson, a Chicago police officer, as two black males, one light complected and one dark complected, both wearing brown jackets and both in their late teens. Officer Newson then took Miss Alexander to the Cook County Hospital. Later that same day Sharon Alexander at the hospital told Investigator Stan Thomas of the Chicago Police Department that one of her attackers was named "Browder," was about seventeen years of age and lived in the 4000 block of West Monroe. She stated that she knew the offender's name and where he lived because she knew his sister. Officer Conroy of the Youth Division of the Chicago Police Department checked the Youth Division files and found the name of a Tyrone Browder who lived at 4053 West Monroe Street and was sixteen years old. Officer Conroy then interviewed Miss Alexander who once again stated that one offender's last name was "Browder" and that he lived in the 4000 block of West Monroe. Officer Conroy called Lucille Browder, the mother of Tyrone Browder, who stated that she did not think Tyrone would be the assailant but that it might be Ben Earl, [4] her other

son.[1] Ben Earl Browder was seventeen years old at the time.

The evidence shows that Officer Conroy, along with three other police officers, went to the Browder home, identified themselves and were admitted by Lucille Browder. Both Browder brothers denied knowledge of the rape, and they and two other teenaged black males at the home were placed under arrest and given the warnings required by *Miranda v. Arizona,* 384 U.S. 436 (1066). At the police station an Officer James noticed that Ben Earl Browder fit the description of an individual, a male Negro, seventeen years old, with a cast on his right arm, who had raped Johnie Mae Johnson on January 30, 1971. At the line-up Ben Earl Browder was identified by both Sharon Alexander and Johnie Mae Johnson as their assailant. Immediately after the line-up petitioner called Officer Conroy to the side and began to confess to the rape of Johnie Mae Johnson. Officer Conroy stopped petitioner by saying "Now wait a minute," and re-advised him of his *Miranda* rights. Petitioner then confessed to raping Johnie Mae Johnson but denied raping Sharon Alexander. Officer Conroy then summoned Investigator Thomas. After being advised of his *Miranda* rights for the third time Ben Earl Browder once again stated that he raped Johnie Mae Johnson.

[5] In order for the arrest to be valid and its "fruits" to be admissible there must be probable cause for the arrest.[2] Probable cause has been defined as facts and circumstances "sufficient to warrant a prudent man in believing that the [suspect] had committed . . . an offense." *Gerstein v. Pugh,* 420 U.S. 103, 111 (1975), quoting from *Beck v. Ohio,* 379 U.S. 89, 91 (1964). These probabilities "are not technical; they

[1] At the district court's evidentiary hearing, Lucille Browder testified on rebuttal that she did not make such a statement and that she did not recall if she spoke to Conroy on the telephone prior to the arrest. Even if said statement were made, it would not constitute probable cause. This remark is distinguishable from the case respondent relies on, *Naples v. United States,* 307 F. 2d 918 (D.C. Cir. 1962), wherein defendant's brother stated his brother "had done something awful," and that he usually carried a knife in an overnight bag.

[2] Respondent contends that even if there was no probable cause for the arrest, the confession would be admissible under *Brown v. Illinois,* 422 U.S. 590 (1975). In light of our decision in the instant case the court need not consider whether there was an untimely appeal as to this issue.

are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States,* 338 U.S. 160 (1949). *See also, United States v. Ganter,* 436 F. 2d 364 (7th Cir. 1970).

Petitioner contends that the arrest of all four youths present at the Browder home indicates that the investigation had not focused on petitioner and was thus a "dragnet" arrest, held in *Mallory v. United States,* 354 U.S. 449 (1957), and *Davis v. Mississippi,* 394 U.S. 721 (1969), to be violative of the Fourth Amendment.

Petitioner's reliance on *Mallory v. United States, supra,* is misplaced. There the defendant was not informed of his right to counsel, his right to a preliminary examination and his right to remain silent and that any statement he might make could be used against him. Even though Mallory was arrested in the early afternoon, it was not until he confessed, some seven to eight hours after [6] his arrest, that the police attempted to reach a United States magistrate for the purpose of arraignment. The court in reversing the conviction held this to be in conflict with Federal Rule of Criminal Procedure 5(a), the right to a prompt arraignment.[3]

In *Mallory* the court did not hold that the police must narrow the focus to just one person for probable cause to exist. Petitioner relies on the statement of the Supreme Court that:

> "It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'" 354 U.S. at 456 (1957).

An analysis of the Supreme Court's opinion in *Mallory, supra,* as well as the appellate court's opinion, *Mallory v. United States,* 236 F. 2d 701 (D.C. Cir. 1956), indicates that the Supreme Court used the above-cited language in response to a prosecution argument that the reason the defendant was not promptly arraigned was because the police wanted to interrogate the witness to find probable cause before bringing him before a magistrate. The Court merely

[3] Federal Rule of Criminal Procedure 5 does not apply in the case at hand as it was a state criminal proceeding.

held that this does not excuse the failure to provide a prompt arraignment before the arrest.

The "multiple arrest" in the case before us is also distinguishable from *Davis v. Mississippi, supra.* In that case at least twenty-four black youths were taken to police headquarters for fingerprinting after the victim "could give no better description [7] of her assailant than that he was a Negro youth." 394 U.S. at 722. The defendant's conviction was reversed because the court held that the Fourth Amendment applies to involuntary detentions occurring at the investigatory stage as well as at the accusatory stage and that there was no probable cause.

In the instant case the police had more evidence than that the assailant was a "Negro youth." Even though there were slight differences in the testimony of Officer Conroy at the evidentiary hearing from the arrest report and the trial, the police had probable cause to believe the assailant was either Ben Earl Browder or his brother, Tyrone Browder, between whom a physical resemblance was noted. In *Davis* the police had fingerprinted twenty-four Negro youths and interrogated "40 or 50 other Negro youths."

Judged by the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," we conclude that the arresting officers, as a result of Sharon Alexander's statements and the police investigation, had probable cause to believe Ben Earl Browder committed the crime. *Brinegar v. United States, supra.* The police had his description, his last name and location of the block on which he lived. The arrest was therefore valid and the subsequent confession was admissible.

For the foregoing reasons the order granting the writ of habeas corpus is REVERSED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 18, 1976

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM E. STECKLER, *District Judge*

(TITLE OMITTED IN PRINTING)

On consideration of the petition of the Petitioner-Appellee, United States of America, ex rel. Ben Earl Browder, for a rehearing by the Court in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing.

IT IS ORDERED that the petition of Petitioner-Appellee for a rehearing in the above-entitled appeal be, and the same is hereby DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

(TITLE OMITTED IN PRINTING)

PETITIONER'S MOTION THAT A DECISION BY UNPUBLISHED ORDER BE ISSUED AS A PUBLISHED OPINION

Petitioner, by counsel, requests that the decision in this case by unpublished order be issued as a published opinion.

As grounds for this motion, petitioner states as follows:

1. The unpublished order in this case involves an issue of continuing public interest, i.e., the authority of police to make warrantless, multiple suspect arrests whenever they suspect that one of several persons had committed an offense, but where the evidence is insufficient to constitute grounds for the arrest of a single suspect. *See ALI, A Model Code of Pre-Arraignment Procedure* (1975), Art. 170.

2. The decision of this Court upholds the warrantless arrest of at least two persons so that they could be placed in a lineup to determine which one, if either, should be charged. Notwithstanding Circuit Rule 28, there is no question that police officers may rely on the disposition of this case in regulating their conduct in the future, and continuing to make the type of arrests at issue in this case. The decision should therefore be published, so that the state courts may, if they choose, fashion procedures to protect the citizenry from the investigatory arrests sanctioned by this Court. See Ariz. Rev. Stat. Ann. 13-1424 (1973 Supp.); Idaho Code § 19-625 (1975 supp.); N.C. Gen. Stats. § 15A-271 et seq.

3. The unpublished order in this case established a new rule of law, as it is the first case in this circuit to be concerned with an arrest of two persons to determine which one, if either, should be charged with an offense.

4. The decision in this case reverses a decision of a district judge; absent a decision of precedential effect, it is likely that another district judge in a similar case would reach the same result as the district judge in this case, again

requiring reversal by this Court. Uniformity of decisions requires that the unpublished order be published.

Respectfully submitted,

/s/ Kenneth N. Flaxman

5549 North Clark Street
Chicago, Illinois 60640
(312) 728-3525
One of the attorneys for petitioner

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

July 9, 1976

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*

(TITLE OMITTED IN PRINTING)

This matter comes before the court on the "PETITIONER'S MOTION THAT A DECISION BY UNPUBLISHED ORDER BE ISSUED AS A PUBLISHED OPINION" filed herein on June 28, 1976 by counsel for the petitioner-appellee. On consideration whereof, this Court being fully advised in the premises.

IT IS ORDERED that the aforesaid motion of the petitioner-appellee be, and the same is hereby, DENIED.

SUPREME COURT OF THE UNITED STATES

No. 76-5325

BEN EARL BROWDER, *Petitioner,*

v.

DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 25, 1977

☆ U. S. Government Printing Office: 1977—235-587/8

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 76-5325

BEN EARL BROWDER,

Petitioner,

vs.

DIRECTOR, DEPARTMENT OF CORRECTIONS,
STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. SCOTT,
Attorney General,
State of Illinois,

JAMES B. ZAGEL,
Assistant Attorney General,
188 West Randolph Street,
Suite 2200,
Chicago, Illinois 60601,
(312) 793-2570.

Page

The petitioner, Ben Earl Browder, was convicted of rape in the Circuit Court of Cook County on August 27, 1971. He was sentenced to serve not less than four nor more than fifteen years in the Illinois State Penitentiary. Petitioner's conviction was affirmed by the Illinois Appellate Court for the First District, 13 Ill. App. 3d 198 (1st Dist. 1973). Leave to Appeal was denied by the Illinois Supreme Court. Petitioner filed a post-conviction petition which was dismissed and that dismissal was affirmed by the Illinois Appellate Court. 29 Ill. App. 3d 596 (1st Dist. 1975).

The petition for a writ of habeas corpus was filed on January 8, 1976. Respondent filed a motion to dismiss the petition on February 11, 1975. Proceedings were stayed by order of the district court on March 7, 1975, pending disposition of petitioner's state appeal. On October 21, 1975, the district court denied respondent's motion to dismiss and issued a writ of habeas corpus and stayed execution for sixty (60) days. On November 18, 1975, respondent filed a motion to further stay the execution of the writ of habeas corpus and to conduct an evidentiary hearing on the issue of whether or not there was probable cause for petitioner's arrest in 1971. The respondent's motion was granted and an evidentiary hearing held on January 7, 1976. After the evidentiary hearing, the district court ordered the writ to issue with a stay of execution for five days. Respondent filed a notice of appeal on January 27, 1976. The Seventh Circuit Court of Appeals reversed the district court's order issuing the Writ.

At the evidentiary hearing on the petition for habeas corpus, petitioner introduced the state court record into evidence and rested his case. (Tr. 4)* Respondent then made a motion for a directed finding in favor of respondent on the basis that the state court record contained no evidence

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* "Tr." refers to the transcript of the proceedings in the district court.

relating to probable cause and the petitioner had therefore not met his burden of proof. (Tr. 5) The motion was denied. (Tr. 6)

The evidence presented by respondent was as follows: James Newson, a police officer for the City of Chicago, testified that on January 29, 1971, he interviewed Sharon Alexander at her home located at 2906 West Van Buren Street in Chicago, Illinois. At that time she told him that she was attacked and raped by two black males on that night at approximately 3922 West Van Buren Street. She described the assailants as two black males, one light-complected and one dark-complected, both wearing brown jackets, and in their late teens. (Tr. 8-9) Officer Newson then took Sharon Alexander to the Cook County Hospital. (Tr. 10) On January 31, 1971, a copy of this report was obtained by Martin Conroy. (Tr. 35)

On that same day, January 29, 1971, Investigator Stan Thomas of the Chicago Police Department was assigned to interview Sharon Alexander at the Cook County Hospital. (Tr. 16) Miss Alexander told him that one of her attackers was a "Browder", who was about 17 years of age and lived in the 4000 block of West Monroe. (Tr. 21) She knew the offender's name and where he lived because she knew his sister. (Tr. 18) Investigator Thomas contacted Officer Conroy of the Youth Division of the Chicago Police Department for assistance in locating the suspect, a man named Browder, about 17 years of age, who lived in the 4000 block of West Monroe, Chicago.(Tr. 21, 35) Officer Conroy checked the Youth Division files and found the name of a Tyrone Browder, age 16. (Tr. 36) Officer Conroy then interviewed the victim, Sharon Alexander, who told him one offender's last name was "Browder" and that he lived in the 4000 block of West Monroe. (Tr. 37) Officer Conroy called the Browder home and spoke with the mother of Tyrone and Ben Earl Browder, who stated that "if it was an assault on a girl it wouldn't be Tyrone, it would be Ben Earl," her other son. (Tr. 40)

Officer Conroy and three other officers went to the Browder home, identified themselves, and were admitted by the mother, Lucille Browder. Mrs. Browder then introduced Ben Earl and Tyrone Browder and two other teenage black males to the officers. (Tr. 41-42) Tyrone and Ben Earl denied knowledge of the rape, and they were placed under arrest. Officer Conroy suggested that the other two young men accompany them to the police station to participate in the lineup, which they did. (Tr. 42-43) All four persons were given Miranda warnings and processed at the police station. (Tr. 43) While at the police station, Ben Earl Browder was observed by one Officer James, who said that petitioner fit the description of an offender (male Negro, seventeen years old, with a cast on right arm) who had raped Johnnie Mae Johnson on January 30, 1971 on West Adams Street (petitioner's Exhibit 2 at evidentiary hearing). Sharon Alexander and Johnnie Mae Johnson each identified Ben Earl Browder, in a lineup, as her assailant. (Tr. 50-51)

Petitioner in rebuttal offered the testimony of Lucille Browder, who denied stating that the boy the police wanted was probably Ben Earl at the time petitioner was arrested. (Tr. 61) Mrs. Browder further testified that she did not recall if she talked with Officer Conroy on the telephone prior to the arrest. (Tr. 61) Tyrone Browder also testified as to the physical characteristics of himself and his brother, Ben Earl. (Tr. 64-67)

THE EVIDENCE PRESENTED AT THE HEARING ON THE PETITION FOR A WRIT OF HABEAS CORPUS DEMONSTRATES THAT AT THE TIME THE POLICE ARRESTED PETITIONER, THEY KNEW THAT EITHER PETITIONER OR HIS SIMILAR-LOOKING BROTHER HAD COMMITTED THE RAPE; ON THAT BASIS ALONE PROBABLE CAUSE EXISTED FOR PETITIONER'S ARREST.

The police officers who arrested petitioner on the evening of January 31, 1971, possessed the following information concerning one of the two assailants of Sharon Alexander:

1. He was a dark-complected male Negro (Tr. 9);
2. In his late teens, approximately 17 years of age (Tr. 22);
3. His last name was Browder (Tr. 22, 37);
4. He lived in the 4000 block of West Monroe Street, Chicago, Illinois (Tr. 18, 22, 37);
5. A Browder family lived at 4053 West Monroe, Chicago, Illinois (Tr. 36, 41);
6. A Tyrone Browder, age 16 years (Tr. 36), and a Ben Earl Browder (Tr. 40) approximately 17 or 18 years of age (Tr. 42), resided at 4053 West Monroe;
7. Ben Earl Browder was a dark-complected male Negro (Tr. 42);
8. Lucille Browder, the mother of Tyrone and Ben Earl Browder, stated in a telephone conversation with police, "if it was an assault on a girl, it wouldn't be Tyrone, it would be Ben Earl ...." (Tr. 40) (1)

As far as the record discloses, there were only two people in the City of Chicago who met the description of Sharon Alexander's assailant as far as name, address, age and physical description -- those two persons being Tyrone and Ben Earl Browder. In addition, the police obtained a statement from Mrs. Browder that "if it was an assault on a girl, it wouldn't be Tyrone, it would be Ben Earl ...." Due to the relationship of mother and son, the police could reasonably infer that the statement was based either on knowledge of this particular crime or a knowledge of the son's general behavioral pattern. Certainly they could consider this information in determining the probable identity of the offender. Cf. Naples v. United States, 307 F.2d 618 (D.C. Cir. 1962) (defendant's brother told officer that defendant might be involved in homicide). With this information in mind, the police could reasonably believe that Ben Earl Browder had committed the rape.

Even if the statement made by Mrs. Browder is ignored, respondent submits that the remaining information the police possessed was sufficient in itself to establish probable cause. As far as the record indicates, Ben Earl and Tyrone Browder were the only two individuals in the City of Chicago that could fit the entire description of one of the offenders. The petitioner, Ben Earl Browder, and his brother, Tyrone, were very similar in physical appearance. At the time of the arrest, Tyrone was 16 years of age (Tr. 36), and petitioner was 17 or 18 years of age. (Tr. 42) Both were dark-complected. (Tr. 42, 65) Tyrone Browder testified that in 1971 he was "taller" than petitioner (Tr. 67), without giving a specific estimate as to height differential. (Tyrone Browder did testify that he is now 6 feet 2 inches and petitioner is now 6 feet 1 inch. (Tr. 66) Due to this similarity in appearance, the arresting officers could not be certain which of the two brothers was the assailant. They did have probable cause to believe, however, that it was one or the other, or possibly both. As a result, both could be arrested. The information possessed by the police narrowed the possibilities to two persons. The information obtained by the arresting officers was much more specific than information which formed the

basis for the lawful arrest in many other instances. For example, in Cupp v. Murphy, 93 S.Ct. 2000 (1973), the information the police possessed at the time they arrested the defendant for the murder of his wife consisted of the facts that: (1) the bedroom in which the wife was found dead showed no signs of disturbance; (2) the decedent's son, the only other person in the house that night, did not have fingernails that could have made the lacerations on the victim's throat; (3) defendant and his wife had a stormy marriage; (4) defendant had been at his home the night of the murder, but left and drove to central Oregon, claiming he did not enter the house; and (5) defendant volunteered a great deal of information, but expressed no concern for his wife. 93 S.Ct. at 2002. This Court found probable cause existed for defendant's arrest. Id. Certainly, the information possessed by police in the instant case was much more substantial and specific than that found in Cupp v. Murphy, supra.

II

NOTICE OF APPEAL WAS TIMELY FILED.

On October 21, 1975, the district court denied respondent's motion to dismiss and issued the writ staying execution for sixty (60) days. On November 18, 1975, respondent filed a motion for a further stay and for an evidentiary hearing on the issue of probable cause. Respondent's motion was granted and an evidentiary hearing was held on January 7, 1976. On January 26, 1976, the district court ordered the writ to issue with a stay of execution for five days. Respondent filed a notice of appeal on January 27, 1976.

Petitioner claims that the final judgment was entered on October 21, 1975, when the district court denied respondent's motion to dismiss and issued the writ. Petitioner also alleges that respondent's motion for an evidentiary hearing on the petition filed November 18, 1975, was a motion for post-judgment relief under F.R.C.P. Rule 60. Petitioner concludes that respondent cannot appeal the October 21, 1975, order since notice of appeal was not filed within 30 days of that date.

In point of fact, respondent's motion was not filed under Rule 60, but filed pursuant to the Habeas Corpus Act, 28 U.S.C. 2254, and Townsend v. Sain, 372 U.S. 293 (1963), as is clear from the face of the motion. Respondent's motion for an evidentiary hearing was granted pursuant to Townsend. See Minute Order dated December 8, 1975. (Petitioner's Appendix at p. 20) Judgment in this cause did not become final or appealable until all steps required by the Habeas Corpus Act had been completed,including the evidentiary hearing.

CONCLUSION

For the foregoing reasons, respondent prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General
State of Illinois

By_____
JAMES B. ZAGEL
Assistant Attorney General
188 West Randolph Street
Suite 2200
Chicago, Illinois 60601
(312) 793-2570

ATTORNEYS FOR RESPONDENT.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

BEN EARL BROWDER,

Petitioner,

-vs-

DIRECTOR, DEPARTMENT OF CORRECTIONS, STATE OF ILLINOIS,

Respondent.

No. 76-5325

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. The Director argues (Resp. 7) that an order granting a petition for a writ of habeas corpus is not a final order if the district subsequently entertains an out-of-time motion for reconsideration. This is contrary to the ordinary rule, recently restated in United States v. Dieter, ___ U.S. ___, 50 L.Ed.2d 8 (1976), that only "timely petitions for rehearing . . . [render] the original judgment nonfinal for purposes of appeal," ___ U.S. at ___, 50 L.Ed.2d at 11.

To have been timely, it was necessary for the motion to reconsider to have been filed within the strict ten day period of Federal Rule of Civil Procedure 59. See Pet. 12 & n. 11; United States v. Braasch, 542 F.2d 442, 444 (7th Cir. 1976). In this case, the motion to reconsider was filed 28 days days after entry of the final order, and therefore did not render the original judgment nonfinal for purposes of appeal. Thus, the court of appeals lacked jurisdiction to reverse the order granting the petition for a writ of habeas corpus, as it appeared to do. (Pet, App. A36)

2. The Director apparently assumes that the warrant clause of the Fourth Amendment is "dead language," and that the Fourth Amendment allows the warrantless search of a dwelling place to arrest two suspects to determine which one, if either, should be charged with an offense. (Resp. 5) These important questions are worthy of review, especially when the Director does not dispute our showing (Pet. 14 n. 17) that relief in this case would not be precluded by Stone v. Powell, ___ U.S. ___ (July 6, 1976).

3. The facts known to the police at the time of arrest were in dispute in the district court. See Pet. 8, n. 6. The district court made no express findings of fact on these questions, apparently accepting our argument that the only material fact was undisputed, and required that relief be granted, because the police may not arrest two suspects in order to place them in a lineup to determine which one, if either, should be charged. In this Court, as in the court of appeals, the Director sets out the facts known to the police at the time of arrest in the light most favorable to the Director, the losing party in the district court. (See Resp. 4) The court of appeals recognized that the facts material to its view of the law were in dispute (Pet. App. A36), but resolved those facts in the first instance. This, we have argued, was a departure from the ordinary role of a court of appeals (Pet. 15 n. 19); we note that the Director has not responded to this argument, but rather repeats in this Court the same misleading statement of facts.

4. The Director has declined to respond to our request that the Court grant certiorari in this case "to review the burgeoning trend towards 'secret law' in the United States Courts of Appeals." (Pet. 22-26) The importance of published

opinions, especially when as here a result unsupported by any direct precedent is reached, was recently underscored by Judge Rosenn in Lowenschuss v. West Publishing Company, 542 F.2d 180, 185 (3d Cir. 1976):

> As ours is a common-law system based on the "directive force" of precedents, its effective and efficient functioning demands wide dissemination of judicial decisions. That segment of the public engaged in the practice of law necessarily must remain abreast of decisions which subtly shape the contours and the body of the evolving law. Practicing attorneys must be able easily to locate authoritative precedents for their posititions. Courts must be able to rely on briefs and citations of attorneys practicing before them and on their own research efforts to direct them quickly to the relevant cases. Even that part of the law which consists of codified statutes is incomplete without the accompanying body of judicial decisions construing the statutes.
>
> Accordingly, under our system of jurisprudence the judiciary has the duty of publishing and disseminating its decisions. . .

Subsequent to the filing of the petition in this case, the Fourth Circuit has adopted a rule for the publication of opinions, Local Rule 18, effective October 8, 1976. While this rule allows the reversal of a district court decision in an unpublished opinion, the rule allows the citation of unpublished opinions,§(d)(iii). At the present time, therefore, virtually all of the circuits have adopted rules pertaining to the use of unpublished orders to dispose of appeals; guidance is needed from this Court lest, as in this case, these unpublished opinion rules are used "to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues," N.L.R.B. v. Amalgamated Clothing Workers, 430 F.2d 966, 972 (5th Cir. 1970) (Brown, C.J.)

It is therefore respectfully submitted that the petition for a writ of certiorari be granted.

Kenneth N. Flaxman

Kenneth N. Flaxman
5549 North Clark Street
Chicago, Illinois 60640
(312) 728-3525

John T. Moran
407 Civic Center
Chicago, Illinois 60602

Attorneys for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5325

BEN EARL BROWDER,

Petitioner,

v.

DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONER BEN EARL BROWDER

KENNETH N. FLAXMAN
5549 North Clark Street
Chicago, Illinois 60640
Phone: 312-728-3525

Attorney for Petitioner

Of Counsel:

JOHN T. MORAN
JOHN M. KALNINS
THOMAS R. MEITES
FREDERICK H. WEISBERG

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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BRIEF OF PETITIONER BEN EARL BROWDER

OPINIONS BELOW

None of the opinions in this case has been published. The opinion of the district court granting the petition for a writ of habeas corpus appears in the Appendix at App. 111-17. The order of the district court denying the Director's motion to reconsider is reproduced at App. 161.

The opinion of the court of appeals is noted in the table of "Decisions by Unpublished Opinions" at 534 F.2d 330, and is reproduced at App. 164-68. The order upon denial of rehearing appears at App. 169.

Opinions in related state court proceedings are reported in abstract form only.[1] *People v. Browder*, 13 Ill.App.3d 198, 300 N.E.2d 511 (1973) (affirming conviction on direct appeal) (App. 7–15); *People v. Browder*, 29 Ill.App.3d 596, 331 N.E.2d 162 (1975) (affirming denial of state post-conviction relief) (App. 106–09).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the court of appeals was entered on April 28, 1976; rehearing was denied on June 18, 1976. The petition for writ of certiorari was docketed on September 7, 1976, and certiorari was granted on January 25, 1977.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, house, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, except upon probable cause, supported by Oath

[1] Under former Illinois practice, an opinion reported as "abstract only" would be reported in headnote form only. Compare the abstract report in *612 North Michigan Ave. Building Corp. v. Factsystem*, 25 Ill.App.3d 529, 323 N.E.2d 493 with the opinion as subsequently published in full, 34 Ill.App.3d 922, 340 N.E.2d 678 (1973). Abstract opinions fell into disuse in 1975 when the Illinois Supreme Court broadened its rules to allow disposition by unpublished order "when the appellate court determines that an opinion would have no precedential value, that no substantial question is presented, or that jurisdiction is lacking." Illinois Supreme Court Rule 23, 58 Ill.2d R. 23, Ill. Rev. Stat., 1975, ch. 110A, §23.

or affirmation, and particularly describing the place to be searched and the person or things to be seized.

United States Constitution, Amendment XIV:

. . . nor shall any State deprive any person of life, liberty or property, without due process of law . . .

28 U.S.C. §2253, which provides in pertinent part:

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

Federal Rule of Civil Procedure 6(b):

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b), except to the extent and under the conditions stated in them.

Federal Rule of Civil Procedure 52:

Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the

extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the questions has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Federal Rule of Civil Procedure 59:

New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period

may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Federal Rule of Appellate Procedure 4(a):

Appeal as of Right—When Taken

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying

a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

Circuit Rule 35 (formerly numbered Rule 28) of the United States Court of Appeals for the Seventh Circuit is reproduced in the appendix to this brief, *infra* at 1a.

QUESTIONS PRESENTED

1. Did the court of appeals have jurisdiction to review the district court's order granting petitioner's application for a writ of habeas corpus when notice of appeal was not filed until 128 days after entry of that final order, and when nothing had occurred to toll the time to appeal?

2. Can there be error in a district court's order denying an untimely motion to alter or amend judgment, when the district court lacked jurisdiction to grant that motion?

3. Did the court of appeals exceed the permissible bounds of appellate review when, without identifying any error that had been committed by the district court, it reversed outright on its independent resolution of disputed facts?

4. Can there be "probable cause to arrest" absent grounds to believe that a particular person has committed an offense, and when arrests based on the information available to the

police result in the seizure of several suspects to determine which one, if any, is to be charged with an offense?

5. May law enforcement officials, consistent with the Fourth Amendment and in the absence of exigent circumstances, embark on a warrantless night-time expedition to a dwelling place and arrest all teen-age males found inside the residence in order to determine which one, if any, should be charged with an offense?

6. Does a federal court of appeals have the inherent power to withhold any of its opinions from publication and to a priori deprive such opinions of precedential value?

STATEMENT OF THE CASE

Petitioner Ben Earl Browder is a state prisoner serving a sentence imposed by an Illinois court in 1971. Petitioner applied to the district court for a federal remedy under 28 U.S.C. §2254 after the state courts had refused to adjudicate Browder's claim that his conviction rests on the fruits of a warrantless, dragnet arrest for "investigation of rape."

A. The Search and Seizure

Petitioner was one of four black teen-age males arrested at the Browder residence at about 6:00 p.m. (App. 53) on January 31, 1971 (App. 24), by four experienced[2] Chicago police officers. The arrests were made to "clear up the investigation" (App. 36) of a rape that had been committed two days before.

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[2]The four officers involved in the arrests had an average of almost nine years of experience. Conroy had been a police officer for about five years (App. 52), O'Driscoll for about fifteen years (App. 39), Ahern for about eight years (App. 25), and Toughey for about seven years. (App. 68.)

The investigation of that rape had been handicapped by the inability of the rape victim, Sharon Alexander, to provide other than a vague description of her attackers: She was able to tell the first investigating officer only that she had been attacked by two black teen-age males, one of light complexion, the other of dark complexion, and that both had worn brown jackets. (App. 126, 128.)

Two days after the rape was reported, Officers Conroy and O'Driscoll were assigned to the case. (App. 52, 79.) "Upon receipt of that assignment" (App. 79), these officers obtained the assistance of two other officers (App. 41, 69), and traveled to the Browder residence "on a rape investigation." (App. 69.) These four plainclothes (App. 53) officers, who had neither an arrest nor a search warrant (App. 73), entered the dwelling, and found inside petitioner, his brother Tyrone Browder, their mother, two other teen-age black males, and "a couple of young ladies and some children." (App. 59.) The police explained to Mrs. Browder that they were taking the teen-age black males "down for questioning" (App. 150), and placed those four persons under arrest for "investigation of rape." (App. 24, 30, 81.)

All four arrestees asserted their innocence. (App. 143.) Petitioner had at first refused to accompany the police officers to the stationhouse, but acquiesced when he was "led out of the apartment." (App. 72.)

The four youths arrested at the Browder dwelling were transported to a police station where they were exhibited in a lineup. (App. 29, 70.) Petitioner was the only person in that lineup who was wearing a white hat. (App. 20-21, 73.) In addition, he was the only person with a bandage or cast on his right hand. (App. 20, 25.)

The lineup was viewed by several women who had made rape complaints. (App. 26.) Testimony was in conflict as to whether these women had viewed the lineup simultaneously (App. 19) or at separate times. (App. 23, 26.) There is no evidence in the record as to the basis, if any, for exhibiting

the "suspects" to anyone other than Sharon Alexander.[3]

Petitioner was pointed out at the lineup by Alexander and by one Johnnie Mae Johnson. (App. 23.) According to police testimony (App. 51-52, 76-77), contradicted by petitioner (App. 84), petitioner then told the police officers that he had raped Johnson but that he had not raped Alexander. No attempt was made to obtain a written confession. (App. 82.)

After this evidence had been obtained, petitioner was formally charged with the rapes of Johnson and Alexander. (App. 81.) The three other "suspects" were released after they had been "processed . . . to make sure that they are not wanted for something." (App. 72.)

Conroy and O'Driscoll thereafter completed a police report setting out the facts of the investigation. (App. 146.) This report (App. 159-60, introduced into evidence at App. 148), refers to the arrests of the four male teen-age black males found in the Browder residence as having resulted from "information from a known informer that the boy's that rape a girl (sic) at 3922 W. VanBuren were known by the above names." (App. 159.) Stan Thomas, a police officer who had not been involved in the arrests, but who was summoned after the lineup (App. 57), also prepared a report after charges had been filed against petitioner. (App. 137.) This report (App. 156-58, introduced into evidence at App. 148), recites that Thomas had spoken

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[3] The opinion of the court of appeals (App. 166) adopts a hearsay statement contained in a police report (App. 157) for displaying petitioner to Johnson: "The undersigned also advised by Off. Conroy, that Off. Wm. James #2775 of the 011th dist. had observed the subject Ben E. Browder and noted that he fitted the description of . . . who had a cast on his right wrist and that was wanted for a rape committed on 30 Jan. 1971 . . ." (App. 157.)

The police report had been introduced into evidence by petitioner (App. 148) only because Stan Thomas, the author of that report, admitted (App. 136) that he had referred to it before testifying in the district court. (App. 149.) Thomas did not testify as to what Officer James may have noticed, and no testimony was presented on this question. It was therefore incorrect for the court of appeals to have relied on this hearsay statement.

with Sharon Alexander on January 29, 1971 when she told him that the surname of one of her assailants was "Browder," "and that he lived in the 4000 block of W. Monroe Street." (App. 157) This report also asserts that Thomas had been told by Conroy about a conversation between Conroy and petitioner's mother during which Mrs. Browder stated that "only one of her sons seemed possible of such a thing and identified him as Ben E. Browder." (App. 157.)

B. State Court Proceedings

The possibility that the lineup identification and the oral confession had been obtained through exploitation of an unlawful arrest was not raised at the state court trial. As the district court found (App. 113), there was no conceivable tactical basis for withholding this claim, and the procedural default can only be explained as a "negligent or inadvertent" mistake of appointed defense counsel.

Prior to trial, petitioner's appointed defense counsel[4] moved to suppress petitioner's oral confession, (App. 17-18), and sought to bar the use of identification testimony. (App. 19.) Suppression of the confession was sought on the alleged failure of the interrogating officers to have given petitioner his *Miranda* warnings.[5] Exclusion of the identification testimony was sought

[4] Petitioner was represented by a trial assistant of the Cook County Public Defender. At the time of petitioner's trial, the Cook County Public Defender was organized to provide a "zone defense," i.e., an indigent defendant would have one attorney at the preliminary hearing courtroom, another attorney at arraignment, and a third at trial. A "trial assistant" would be assigned to a judge hearing felony cases. Virtually all "public defender" cases in that courtroom would be defended by that "trial assistant."

[5] The form motion to suppress contained a conclusory allegation that the confession was the product of "mental coercion." (App. 17, ¶5.) This assertion was subsequently abandoned. (App. 27.)

on the grounds of suggestiveness in the lineup procedures. (App. 48-49.)

At the hearing on the motion to suppress identification testimony, officer Conroy testified that the arrests had been made on information about "a possible offender by the name of Browder," corroborated by a "listing" in police files for Tyrone Browder (App. 21), petitioner's brother. Conroy admitted on cross-examination that four persons had been arrested at the Browder residence for "investigation of rape." (App. 24.)

Testimony at the hearing on the motion to suppress the confession established that the alleged oral statement had been triggered by the lineup identification. (App. 28.) Additional evidence pertaining to the circumstances of the arrest was adduced at the hearing on this motion, and it became clear that the four arrests had been made so that the police "could clear up the investigation." (App. 36.)

These pre-trial motions were denied. (App. 49-50.) The case then proceeded to trial, where the defense theory of the case was that the identification testimony was unreliable (App. 51), and that the police testimony about the existence of an oral confession should not be believed. (Ibid.)

In cross-examination of the prosecution witnesses, defense counsel repeatedly returned to the circumstances of the arrest, and established that the expedition to the Browder dwelling had been made without an arrest warrant (App. 73), without a search warrant (Ibid.). and that, prior to traveling to the Browder residence, the police claimed to have known that "the gentlemen would be waiting." (App. 63.)

Browder testified on his own behalf, asserted his innocence (App. 84), and denied having made an oral confession. (Ibid.) In cross-examination, petitioner stated that at the time of the rape he was at home in the company of his mother and several other persons. (App. 88.) The defense rested without calling any other witnesses. (App. 98.)

In his closing argument, the prosecutor commented upon the failure of the defense to have presented additional evidence.

(App. 99–100.) Defense counsel waived final argument (App. 101), and petitioner was convicted of rape. (Ibid.) The unlawful arrest issue was not raised in post-trial motions (App. 103–03), which were denied. (App. 104.)

Petitioner sought to raise the unlawful arrest issue for the first time in his direct appeal to the Illinois Appellate Court. (App. 9.)[6] That court held that because "this contention was not raised in the trial court, either during the trial or in the motion or argument for a new trial (Ibid.), "it cannot now be raised on appeal." (App. 11.) Petitioner then applied for discretionary review in the Illinois Supreme Court (App. 16), arguing that when "defense counsel inadvertently failed to pinpoint the unlawful arrest as the basis of the motions to suppress the fruits of the arrest," the waiver rule applied by the appellate court improperly "denied defendant a fair opportunity to raise and have adjudicated on direct appeal his Fourth Amendment claims, when the factual basis for these claims is clear from the trial court record." (Ibid.) Review was denied without opinion. 54 Ill.2d 597 (1973).

Petitioner also sought to raise the unlawful arrest issue under the Illinois Post-Conviction Hearing Act, Ill.Rev.Stat. ch. 38, §122-1 et seq. His application for relief was dismissed without the reception of evidence by the trial court. (App. 4, ¶8.) On appeal, the Illinois Appellate Court upheld the decision of the trial court to refuse to adjudicate the Fourth Amendment issue, holding that this issue was "res judicata" because it had been raised, albeit not adjudicated, on direct appeal. (App. 108.)

[6]While petitioner was again represented by the Cook County Public Defender on this appeal, trial counsel was not involved in appellate proceedings.

C. Federal Habeas Corpus Proceedings

On October 21, 1975, following the termination of state court proceedings,[7] the district court granted petitioner's application for a writ of habeas corpus on the basis of the state trial record. (App. 110.) The district court held that the failure of petitioner's trial counsel to have raised the unlawful arrest issue was an "inadvertent or negligent mistake" which, under *Henry v. Mississippi*, 379 U.S. 443 (1965) did not bar petitioner from federal habeas corpus relief on his Fourth Amendment claim. (App. 113.) On the merits of that issue, the district court found that petitioner had been arrested without probable cause. (App. 114.) The illegality of the arrest was held to have tainted the alleged oral confession (App. 116) and the lineup identification (App. 115), but not the in-court identification. (App. 116.) Execution of the writ was suspended for 60 days to allow a re-trial. (App. 117.)

Twenty–six days after the petition had been granted, the Director withdrew the state court record from the files of the district court. (App. 1.) Two days thereafter, and twenty-eight days after the petition had been granted, the Director filed a "motion to further stay the execution of the writ of habeas corpus and to conduct an evidentiary hearing." (App. 118.) This motion was predicated on the fact that the "issue of probable cause was never litigated" in state court proceedings (App. 119, ¶5), and asserted that "from a preliminary inquiry

[7]Petitioner's appeal from the denial of state collateral relief was before the Illinois Appellate Court at the time the habeas petition was filed. (App. 5, ¶9.) The district court held that recourse to the state collateral remedy had not been necessary to exhaust state remedies (App. 105), but stayed proceedings before it "until such time as the Illinois court rules or dismisses the case on petitioner's motion for voluntary dismissal." (Ibid.) Shortly thereafter, the state appellate court affirmed the denial of state collateral relief (App. 106), and the district court took active jurisdiction of the case. (App. 1.)

into matters outside the record it appears that one could reasonably believe that probable cause did exist." (App. 119, ¶4.)

After concluding "that the request for an evidentiary hearing should not be denied solely because it is untimely," (App. 120), and over petitioner's objection that the "court no longer has jurisdiction to alter or amend its final order of October 21, 1975" (App. 112), the district court set the motion for a hearing. (App. 121.)

At the hearing, the Director sought to prove that there had in fact been probable cause to arrest through the testimony of three police officers. The first, James Newsome, testified to the initial police contact with Sharon Alexander (App. 125), and admitted that Alexander had been able to provide only a vague and non-specific description of her assailants. (App. 128.) The second witness, Stan Thomas, stated that he had interviewed Alexander on the day of the rape (App. 129), and that she had told him that she knew the surname of one of her assailants to be "Browder," and that she knew that he lived in the "4000 block of Monroe." (App. 130.) Two days later, on January 31, 1971, Thomas enlisted the aid of Martin Conroy in the investigation. (App. 132.) Thomas admitted that he was unfamiliar with the inhabitants of the neighborhood which contained the "4000 block of Monroe," (App. 135.) No explanation was offered for Thomas' failure to have acted more promptly on the information that he had allegedly received from Alexander.

Conroy testified that he had become involved in the investigation on January 31, 1971. (App. 138.) His first act, he claimed, was to travel to another police station to check the "Youth Files." (App. 139.) From these files, Conroy "came up with the name Browder and address of 4053 West Monroe, and the first name Tyrone, a 16 year old male Negro." (Ibid.) After obtaining this information, and accompanied by his partner, Francis O'Driscoll (App. 140), Conroy spoke with Alexander. (Ibid.) According to Conroy, she told him that one of her assailants was a "teen-ager older than her, like 16, 17, 18 like that, and it was a Browder that lived on

Monroe." (App. 146.) Conroy claimed to have then verified that a Browder family lived at 4053 West Monroe Street. (App. 141.) After obtaining assistance from two other officers (Ibid.), and still accompanied by his partner, Conroy went to 4053 West Monroe Street to arrest "a teen-aged Browder, like 15, 16, 17, 18." (App. 146.)

Inside the dwelling at that address, Conroy found two teenagers whose surname was Browder. (App. 147.) They both denied involvement in the offense under investigation (Ibid.), and they were both arrested "[t]o see which one, if either, would be the one who would be identified." (App. 148.) Conroy admitted that he did not know which one, if either, would be identified. (Ibid.) Conroy claimed that the two other youths found in the Browder residence had voluntarily accompanied the police officers to stand in the lineup to insure that it would be fair. (App. 142-43.)

A police report (App. 159-60), which Conroy had helped prepare (App. 146), and which he had adopted as his own (App. 148), was introduced into evidence by petitioner. (Ibid.) This report states that four persons had been arrested at the Browder residence, and that the arrests were made on "information received from a known informer." (App. 159.)

Conroy also repeated his trial testimony (App. 23), that prior to making the arrests he had spoken with petitioner's mother, who—he claimed—had stated that "if it was an assault on a girl, it wouldn't be Tyrone, it would be Ben Earl, her other son." (App. 142.) Mrs. Browder, who had not testified at trial, testified in the district court, and denied having made such a statement. (App. 151.)

After hearing all of the evidence, the district court denied the motion to reconsider, finding that "the writ of habeas corpus was properly issued on October 21, 1975." (App. 161.) Execution of the writ was stayed for five days "pending prompt filing of notice of appeal and application to the Court of Appeals for a further stay." (Ibid.)

On January 27, 1976, the Director filed its notice of appeal, seeking review of "the orders issuing a writ of habeas corpus

entered in this action on October 21, 1975 and January 26, 1976." (App. 162.) A panel of the court of appeals refused to stay execution of the writ (App. 163), and petitioner was released from custody.

Another panel of the court of appeals subsequently reversed the order granting the petition for writ of habeas corpus. (App. 168.) The court's opinion—which was designated as an "unpublished order"—recognizes that appellate jurisdiction was based on a motion to reconsider filed 28 days after entry of the district court's order granting the petition. (App. 165.) The opinion does not identify the error justifying reversal, but concludes that there had in fact been probable cause to arrest. (App. 168):

> Even though there were slight differences in the testimony of Officer Conroy at the evidentiary hearing from the arrest report and the trial, the police had probable cause to believe that the assailant was either Ben Earl Browder or his brother Tyrone Browder between whom a resemblance was noted.

Re-hearing and a suggestion that the case be re-heard in banc was denied without opinion. (App. 169.) Petitioner subsequently requested that the panel's "unpublished order" be reissued as a published opinion. (App. 170–71.) This motion was denied without explanation. (App. 172.)

SUMMARY OF ARGUMENT

The threshold question in this case is whether the court of appeals had jurisdiction to review the district court's order granting petitioner's application for a writ of habeas corpus. The order granting the petition was entered on October 21, 1975; twenty-eight days thereafter, or November 18, 1975, the Director filed a motion to reconsider. The district court held a hearing on the motion to reconsider, and the Director's notice of appeal was filed after the district court had refused to alter or amend its order granting the petition.

The motion to reconsider was not filed within the mandatory and jurisdictional time limits of Rules 52 and 59 of the Federal Rules of Civil Procedure, and it did not toll the time to appeal from the final order. Notice of appeal, filed on January 27, 1976, was therefore hopelessly beyond the 30 day limit of Rule 4 of the Federal Rules of Appellate Procedure, and the court of appeals lacked jurisdiction to review the final order of the district court.

Another consequence of the untimeliness of the motion to reconsider was that the district court had lost jurisdiction to alter or amend its order granting the petition, and therefore lacked the power to grant the motion to reconsider. Thus, an appeal from the order denying reconsideration could not vest the court of appeals with the power to reverse the decision of the district court refusing to grant the untimely motion to reconsider.

Even if the court of appeals did have jurisdiction to review the decision of the district court, the court below erred when it considered the case *de novo* and reversed outright, applying its independent appraisal of disputed facts to a legal standard for warrantless arrests which, if allowed to stand, is tantamount to a repeal of the Fourth Amendment. Because this Fourth Amendment standard is plainly wrong, there is no need to remand to the district court for resolution of the factual disputes, even if there had been a timely notice of appeal.

While the absence of a timely notice of appeal would allow the Court to reverse the decision below without reaching the Fourth Amendment questions, the same result would be achieved by disposition on the merits. *Stone v. Powell*, 428 U.S. 465 (1976) is no bar to habeas corpus relief. First, the totality of state procedures failed to provide petitioner with an opportunity for full and fair litigation of his Fourth Amendment claim, the *sine qua non* of *Stone v. Powell.* Second, even if the state had provided petitioner with a "full and fair opportunity," but had nonetheless misconceived the Fourth Amendment and denied relief, a federal remedy would be required because of the flagrancy of Fourth Amendment

violation–not present in *Stone v. Powell*–which underlies this case.

The Fourth Amendment standard applied by the court of appeals allows the police to enter dwellings, at night, without a warrant, and absent exigent circumstances, in order to seize several suspects to determine which one, if any, should be charged with an offense. Allowing arrests when there is insufficient information to warrant a belief that a particular person has committed a crime strikes at the central teaching of this Court's Fourth Amendment jurisprudence. Legitimizing multiple suspect, warrantless arrests "for investigation" would reduce the Fourth Amendment to little more than rhetoric.

This case also presents the question repeatedly reserved by the Court, i.e., whether a warrant is required to search a dwelling when the seizure of a person, rather than "papers and effects" is sought. A search warrant plainly would have been required if the police in this case had entered the dwelling to seize physical evidence, and it should be of no consequence that a dwelling search is made to seize persons, rather than to seize "papers and effects." Requiring recourse to the disinterested judicial officer contemplated by the Fourth Amendment would provide the greatest protection against recurrence of the egregious police misconduct apparent in this case.

In summary, whether this case is resolved on the jurisdictional question or on the merits of the Fourth Amendment issues, the result is the same: The decision below must be reversed, and the case remanded to the district court with instructions to reinstate its writ of habeas corpus.

An additional issue presented by this case arises from the fact that the decision below was reached in a purportedly non-precedential "unpublished order." This is the first case where the propriety of a circuit rule authorizing such dispositions is squarely at issue. These rules–which have been adopted with minor variations in each of the circuits–are based on the assumption that a court of appeals has the power to determine which of its adjudications are to have precedential value, and vest in the court of appeals the power to decide which of its

opinions are to be published. These rules have severe shortcomings, are founded on tenuous legal grounds, and exceed the powers vested in a court of appeals by 28 U.S.C. §2071. Until and unless a uniform "no-publication" rule is promulgated by this Court and approved by Congress pursuant to 28 U.S.C. §2072, the courts of appeals lack the power to designate any of their opinions as "not for publication" and as "non-precedential." Accordingly, the court below should be directed to release its decision in this case–and, by implication, its decisions in all other cases decided by "unpublished orders"–for publication free of any restrictions on citations in subsequent cases.

I.

THE COURT OF APPEALS LACKED JURISDICTION TO REVERSE THE FINAL ORDER OF THE DISTRICT COURT.

The respondent in this case, appellant in the court below, failed to file a timely notice of appeal. The court of appeals therefore lacked jurisdiction and its decision is a nullity which must be reversed.

The thirty day period in which an appeal could have been perfected in this case started to run on October 21, 1975, when the district court's final order[8] of that date (App. 110)

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[8] An appeal in a habeas corpus proceeding lies from the "final order." 28 U.S.C. §2253. The order of October 21, 1975 was "final" because it "terminate[d] the litigation between the parties on the merits of the case, leav[ing] nothing left to be done but to enforce by execution what had been determined." *St. Louis, Iron Mountain and Southern Ry. Co. v. Southern Express Co.*, 108 U.S. 24, 28-29 (1883). Had an appeal been taken from this order, and the decision of the district court affirmed, that court "would have nothing to do but to execute the decree which it had already rendered." *Independent School District v. Hall*, 106 U.S. 428, 430-31 (1882).

was entered on the civil docket.[9] (App. 1.) Notice of appeal, however, was not filed until January 27, 1976 (App. 3), 128 days after entry of the final order, and hopelessly beyond the jurisdictional time limits of Rule 4(a) of the Federal Rules of Appellate Procedure.[10]

In lieu of an appeal, the Director asked the district court to receive additional evidence and to alter its final order. (App. 118–19).) This motion, however, was not made until 28 days after entry of the final order, and did not toll the time to appeal.

Rule 4(a) of the Rules of Appellate Procedure makes clear that the time to appeal will be only tolled by a timely motion under Civil Rules 50(b), 52(b), or 59. The motion to reconsider in this case sought the type of relief contemplated by Rule 52(b) (new findings of fact) and Rule 59(a) (entry of amended judgment). To be timely under either of these rules, a motion to reconsider must be made within ten days of entry of the final order.[11] Civil Rule 6(b) prohibits a district court

[9] Rule 4(a) of the Federal Rules of Appellate Procedure provides, in pertinent part, that notice of appeal shall be filed "with the clerk of the district court within 30 days of the entry of the judgment or order appealed from," and that "a judgment or order is entered within the meaning of this subdivision when it is entered on the civil docket."

[10] There can be no question that a timely notice of appeal is a jurisdictional prerequisite to appellate review. See, e.g., *Brooks v. Norris*, 52 U.S. (11 How.) 204 (1850); *Cummings v. Jones*, 104 U.S. 419 (1882); *Scarborough v. Parquod*, 108 U.S. 567 (1883); *Credit Co. v. Arkansas Central Ry. Co.*, 128 U.S. 567 (1888); *Conboy v. First National Bank*, 213 U.S. 141 (1906); *Old Nick Williams Co. v. United States*, 215 U.S. 541 (1910); *United States v. Schaefer Brewing Co.*, 356 U.S. 227 (1958); *United States v. Robinson*, 361 U.S. 220 (1960); *Fallen v. United States*, 378 U.S. 139 (1964).

[11] Rule 52(b) requires that a motion to amend findings of fact or to make additional findings must be "made not later than 10 days after entry of judgment." Rule 59 requires that a motion for a new trial, or a petition for re-hearing must be "served not later than 10 days after the entry of the judgment." At least one court has held the distinction between "made" and "served" to be a distinction with a difference. *Hahn v. Becker*, 551 F.2d 741 (7th Cir. 1977). This question is not presented here, because the motion was filed and served on the same day.

from enlarging this "mandatory and jurisdictional" time period. *United States v. Robinson*, 361 U.S. 220, 229 (1960).

Thus, because the motion to reconsider was untimely under Rules 52 and 59, it did not toll the time to appeal. Notice of appeal not having been filed until 128 days after entry of the district court's final order, the court of appeals lacked jurisdiction to review that order.

The notice of appeal also sought review of the order of January 26, 1976 denying the untimely motion to reconsider. (App. 162.) Review of that order could not vest the court of appeals with jurisdiction in any meaningful sense because the district court had lacked the power to grant the motion to reconsider: For almost thirty years, the power of a district court to receive additional evidence and to alter or amend a final order has been circumscribed by the time limits of Civil Rules 52 and 59.[12] The motion to reconsider was untimely under these rules and was a nullity.

The untimeliness of the motion to reconsider is apparent on the face of the opinion of the court below. (App. 165.) From a cryptic footnote in that opinion, it appears that the court of appeals was holding that while the motion to reconsider may not have tolled the time to appeal from the final order, it was nonetheless effective to render non-final that portion of the district court's decision that petitioner's arrest was without probable cause (App. 166 n. 2):

[12] Prior to the 1946 amendments to the Rules of Civil Procedure, a district court could entertain a petition for rehearing at any time during the term of court in which a judgment had been entered. See *United States v. Mayer*, 235 U.S. 55, 67 (1914). Practice in habeas corpus proceedings conformed to this procedure. See, e.g., *Tiberg v. Warren*, 192 F. 458 (9th Cir. 1911); *Aderhold v. Murphy*, 103 F.2d 492 (10th Cir. 1939).

The 1946 amendments to the Rules of Civil Procedure abolished terms of court, and limited the power of a district court to alter or amend a final order to the time periods of Rule 59. See Advisory Committee Comments to the 1946 Amendments to Rule 73 of the Rules of Civil Procedure, 5 F.R.D. 484, 486.

> Respondent contends that even if there was no probable cause for the arrest, the confession would be admissible under *Brown v. Illinois*, 422 U.S. 590 (1975). In light of our decision in the instant case, the court need not consider that issue *nor need it consider whether there was an untimely appeal as to this issue.* (emphasis supplied)

The habeas corpus statute does not authorize piecemeal appeals, *Collins v. Miller*, 252 U.S. 364, 370 (1920), and if there was an untimely appeal as to one issue, there was an untimely appeal as to all issues that had been decided by the district court.

The only way in which the district court could have granted the post-judgment relief sought by the Director was through Rule 60(b) of the Rules of Civil Procedure. The Director has expressly disavowed reliance upon this rule, recognizing we presume, that there was no basis for Rule 60(b) relief.[13] Following this concession, it was the duty of the court of appeals to dismiss the appeal: "Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case." *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

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[13] In its reply brief (at 3) in the court of appeals, the Director stated that "respondent's motion was not filed under Rule 60." The same assertion is made in this Court, Opposition to Pet. for Writ of Cert. at 7.

The Director should not be permitted to withdraw these concessions. *United States v. Ortiz*, 422 U.S. 891, 898 (1975). To do so, however, would be futile. First, a Rule 60(b) motion may not be used as a subterfuge for an untimely Rule 59 motion. *Hartman v. Lauchli*, 304 F.2d 431, 432 (8th Cir. 1962); *Swam v. United States*, 327 F.2d 431, 433 (7th Cir. 1964). Second, viewed as an appeal from the denial of Rule 60(b) relief, the Director's appeal is utterly without merit: There is no basis upon which it could even be argued that the district judge had abused his discretion in "ruling that sufficient grounds for disturbing the finality of the judgment were not shown in a timely fashion." *Brennan v. Midwestern United Life Insurance Co.*, 450 F.2d 999, 1003 (7th Cir. 1971).

The Director had three alternatives when the district court granted the petition: To appeal, to file a timely motion to reconsider, or to accept the district court's decision and allow Illinois to re-try petitioner. The Director chose a fourth course of action and filed its untimely motion to reconsider. The effect of this choice may, in hindsight, be regretted, but the consequences of this choice are inescapable: "When the time for taking an appeal has expired it cannot be arrested or called back by a simple order of court." *Credit Co. v. Arkansas Central Ry. Co.*, 128 U.S. 258, 261 (1888). As the Court stated in *Ackerman v. United States*, 340 U.S. 193 (1950);

> [The Director] made a considered choice not to appeal . . . His choice was a risk, but calculated and deliberate and such as follows a free choice. [The Director] cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong . . . Id. at 198.

To find that the court of appeals had jurisdiction to review the decision of the district court in this case would be to "twist the fabric" of Rule 4 of the Rules of Appellate Procedure "more than it will bear." See *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 746 (1976). Accordingly, the decision below must be reversed, and the case remanded to the district court with instructions to reinstate its writ of habeas corpus.

II.

A COURT OF APPEALS MAY NOT DECIDE FACTUAL ISSUES DE NOVO.

Even assuming that the court of appeals had jurisdiction to review the decision of the district court, it lacked the power to reverse outright on its independent appraisal of disputed facts.

That the court of appeals considered the case *de novo* without deference to the opportunity of the district judge to have observed the character and demeanor of the witnesses is

apparent on the face of the "unpublished order" (App. 168):

> Even though there were *slight differences* in the testimony of Officer Conroy at the evidentiary hearing from the arrest report and the trial, the police had probable cause to believe that the assialant was either Ben Earl Browder or his brother Tyrone Browder, between whom a resemblance was noted. (emphasis supplied)

Perjury cannot be characterized as a "slight difference in testimony." Conroy plainly lied in the district court when he stated that only petitioner and his brother had been arrested at the Browder dwelling, and that the two other youths found inside the home had voluntarily accompanied the police to the stationhouse. (App. 143.) Conroy's trial testimony was directly to the contrary: "At the Browder home there was Ben Earl, his brother Tyrone, the two boys, I don't really recall their names *but we arrested them* and they stood in the lineup." (App. 29.) (emphasis supplied)[14]

In addition, Conroy's testimony in the district court bristled with new details, inconsistent with trial testimony, which were directed towards justifying the reasonableness of the arrests.[15]

[14] Two of the other officers involved in the arrest testified in state court that four persons had been arrested. (App. 73, 81.) The third officer stated that petitioner had been arrested (App. 64), that "[t]here were four fellows that were taken into the station" from the Browder residence (Ibid), and that all four had voluntarily accompanied the police. (App. 67.) Conroy's arrest report refers to the arrest of four persons (App. 159, introduced into evidence at App. 148), but later states that only petitioner had been arrested. (App. 160.)

[15] At trial, Francis O'Driscoll, Conroy's partner, testified that the expedition to the Browder home commenced "upon receipt of that assignment." (App. 79) Conroy testified in state court that the arrests were based on "information about a possible offender by the name of Browder." (App. 31.) The apparent source of this "information," according to Conroy's police report (App. 159, introduced into evidence at App. 148), was "information from known informer."

In contrast to trial testimony, Conroy testified in the district court that the arrests had been based on information received from Sharon Alexander, and that prior to making the arrests he had spoken with her, and then spoken to one "Little Man," who had pointed out the location of the Browder residence. (App. 140-41.) Accompanying Conroy in these activities was his partner, Francis O'Driscoll. (App. 140.)

In this case, the district judge would have been justified in rejecting the entirety of Conroy's testimony. But no matter how slight the differences in testimony may have been, the function of appellate courts "is not to decide factual issues de novo." *Zenith Radio Corp. v. Hazeltine Research Corp.*, 395 U.S. 100, 123 (1969). Appellate review of factual issues is limited by the clearly erroneous test, *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), especially when, as here, questions of "design, motive and intent with which men act" are at issue. *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949).

The ultimate finding of fact made by the court of appeals—that "the police had probable cause to believe that the assailant was either Ben Earl Browder or his brother Tyrone" (App. 168)—indicates that in addition to resolving factual questions de novo, the court of appeals was holding that the Fourth Amendment permits the warrantless arrest of several persons at night, from a dwelling, whenever the police believe that the offender sought will turn up among those arrested.

As set out below, such a standard, if allowed to stand, is tantamount to a repeal of the Fourth Amendment. But even assuming the correctness of this novel standard, the appropriate disposition of the appeal would have been to remand to the district court for its resolution of disputed facts and a determination if, in fact, the "police had probable cause to believe that the assailant was either Ben Earl Browder or his brother Tyrone." As this Court reminded the federal courts of appeals in *DeMarco v. United States*, 415 U.S. 449, 450 n.* (1974), "factfinding is the basic responsibility of district court, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court.

As we demonstrate below, the Fourth Amendment standard applied by the court of appeals is plainly wrong, and even if there was a timely notice of appeal, there is no need to remand

to the district court for resolution of the factual disputes. Instead, the decision below must be reversed, and the case remanded to the district court with instructions to reinstate its writ of habeas corpus.

III.

THE BLATANTLY INVESTIGATIVE, WARRANTLESS NIGHT-TIME ARRESTS MADE AT PETITIONER'S DWELLING IN THE ABSENCE OF EXIGENT CIRCUMSTANCES WERE CONTRARY TO THE FOURTH AMENDMENT.

Introduction

The decision of the court of appeals vests police officers with the powers of a general warrant—the discretion to search when and where they choose, and the power to arrest whomever they may suspect. These are precisely the evils which were proscribed by the Fourth Amendment, and the court of appeals erred in concluding that petitioner had been lawfully arrested.

In our view, the court of appeals lacked jurisdiction to consider the legality of petitioner's arrest because the Director had failed to file a timely notice of appeal from the district court's final order. See *ante* at 19-23. The Court may therefore reverse the decision below without reaching the Fourth Amendment questions. On prior occasions, however, the Court has declined to resolve a threshold jurisdictional question when the same result would be achieved by disposition on the merits. *United States v. Augenblich*, 393 U.S. 348, 349-52 (1969); *Norton v. Matthews*, 427 U.S. 425, 530-32 (1976). Petitioner, of course, has no preference for the ground which is used to reverse the decision of the court of appeals, and we submit the following argument in the event the Court

chooses to reverse on the Fourth Amendment issues in this case.[16]

A.

PETITIONER WAS ARRESTED ABSENT THE "QUANTUM OF INDIVIDUALIZED SUSPICION" REQUIRED BY THE FOURTH AMENDMENT.

The "quantum of individualized suspicion" required by the Fourth Amendment, *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976), was intended to eliminate indiscriminate and discretionary searches and seizures made under general warrants.[17] The arrests in this case are precisely the type of seizures which would have been authorized by a general warrant.

First, the arrests were of indiscriminate quality. While the police may have intended to arrest "a teen aged Browder, like 15, 16, 17, 18," (App. 146), two teen-age black males, whose surname was not Browder, were caught up in the dragnet. Second, the arrests were the product of unfettered police discretion, both as to the time and place of the arrests, and as to the decision to arrest all of the teen-age males found within the Browder residence. These indicia of seizures made as under a

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[16] As discussed infra at 41-50, habeas corpus relief would not be precluded by *Stone v. Powell*, 428 U.S. 465 (1976).

[17] See, e.g., *G.M. Leasing Corp. v. United States*, --U.S.--, 97 S.Ct. 619 (1976); *Stone v. Powell*, 428 U.S. 465, 482 (1976); *United States v. Ortiz*, 422 U.S. 891, 895-96 (1975); *United States v. United States District Court*, 407 U.S. 297, 316-17 (1972); *Berger v. New York*, 388 U.S. 41, 58 (1967); *Stanford v. Texas*, 379 U.S. 476, 480-86 (1965); *Marcus v. Search Warrant*, 367 U.S. 717, 724-29 (1961); *Henry v. United States*, 361 U.S. 98, 100-01 (1959); *Frank v. Maryland*, 359 U.S. 360, 363-65 (1959); *Marron v. United States*, 275 U.S. 192, 195 (1927); *Boyd v. United States*, 116 U.S. 616, 624 (1886).

general warrant reflect the absence of the "quantum of individualized suspicion" required by the Fourth Amendment.

In the view of the court of appeals, petitioner and his brother Tyrone Browder were arrested because they both resembled a suspect allegedly sought by the police: A dark complected, teen-age male, of unknown height and weight, with no other known physical features, whose surname was Browder and who lived in the "4000 block" of West Monroe Street in Chicago, Illinois. (App. 165.)[18] Only a warrant to seize "all teen-aged Browders who live in the 4000 block of West Monroe Street" could have been issued on this information. Such a warrant is but a short step removed from a "ridiculous warrant against the whole English nation."[19] and is virtually identical to a warrant to arrest all "Blackie Toy's, operator of a laundry somewhere on Leavenworth Street," condemned as "no better than the wholesale or 'dragnet' search warrant" in *Wong Sun v. United States*, 371 U.S. 471, 481 n. 9 (1963).

In this case, it is obvious that if the police had applied for a warrant they would not have been able to describe with specificity the person to be seized. As the principal arresting officer admitted, he did not know which, if any, of the suspects he had placed under arrest would be identified at the planned lineup. (App. 148.)

In prior cases, the Court has repeatedly held that the Fourth Amendment means what it says in its requirement that probable cause be sufficient to particularly describe the person to be

[18] The court of appeals mistakenly concluded that petitioner and his brother Tyrone Browder were of similar appearance at the time of arrest. (App. 168.) Trial testimony reveals that petitioner was the only person seized at the Browder dwelling who had his arm in a "bandage or cast," (App. 20, 25), a salient characteristic lacking in the physical description available to the police at the time of arrest.

[19] *Stanford v. Texas*, 379 U.S. 476, 483 (1965), quoting II May's *Constitutional History of England*, 247 (Am Ed 1864).

seized. "[A]n officer may lawfully arrest a person when he is apprised of facts sufficient to warrant a belief that *the person* has committed or is committing a crime." *Terry v. Ohio*, 392 U.S. 1, 26 (1968) (emphasis supplied)[20] Applying the unambiguous language of the Fourth Amendment, virtually every court which has considered the question has condemned as unlawful an arrest made solely because the arrestee was one of several persons who corresponded to a non-specific description of an offender sought by the police.[21] The Seventh Circuit, both in this case and in a subsequent decision, has held to the contrary.[22]

[20] See also *Carroll v. United States*, 267 U.S. 132, 161 (1925) ("reasonable ground to believe that the accused has been guilty of a felony"); *Jones v. United States*, 357 U.S. 493, 502 (1958) (Clark, J., dissenting) ("Probable cause is reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged."); *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (whether, at the time of arrest, the facts known "were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."); *United States v. Marion*, 404 U.S. 307, 320 (1971) ("To legally arrest and detain, the Government must assert probable cause to believe that the arrestee has committed a crime."); *United States v. Watson*, 423 U.S. 411, 431 n. 4 (Powell, J., concurring) (". . . and, of course, that the person to be arrested was the offender."); *Stone v. Powell*, 428 U.S. 465, 538 (White, J., dissenting) (". . . reasonable ground to believe that a crime has been committed and that a particular suspect has committed it").

[21] See, e.g., *Gatlin v. United States*, 117 U.S.App.D.C. 123, 127, 326 F.2d 666, 670 (1963); *United States v. Shavers*, 524 F.2d 118 (5th Cir. 1975); *In re Puma County Anonymous*, 110 Ariz. 98, 103, 515 P.2d 600, 604-05 (1973); *In re Woods*, 20 Ill.App.3d 641, 647-48, 314 N.E.2d 606, 610 (1974); *Commonwealth v. Jackson*, 459 Pa. 669, 674-75, 331 A.2d 189, 191 (1975).

[22] *United States ex rel. Burbank v. Warden*, 535 F.2d 361, 366 (7th Cir. 1976), reversing 404 F.Supp. 656 (N.D.Ill. 1975) (finding probable cause to arrest because suspect corresponded to description of offender as a young black male of average size who was considered to be attractive in appearance).

Allowing arrests, as in this case, where there is insufficient information to warrant a belief that a particular person has committed a crime is to resurrect the unbridled authority of the general warrant by "plac[ing] the liberty of every man in the hands of every petty officer."[23] Such a standard for seizures of the person strikes at the "central teaching of this Court's Fourth Amendment jurisprudence," *Terry v. Ohio*, 392 U.S. 1, 21 n. 18 (1968). If this "demand for specificity," *Ibid.*, is relaxed, then "the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Beck v. Ohio*, 379 U.S. 89, 97 (1964). *See also Johnson v. United States*, 333 U.S. 10, 14 (1948). For these reasons, the decision below cannot be allowed to stand.

B.

WARRANTLESS ARRESTS FOR INVESTIGATION ARE CONTRARY TO THE FOURTH AMENDMENT.

That the arrests in this case were made "for investigation of rape" is apparent from the state trial transcript (App. 24, 30, 36, 53, 81–82), and was admitted in the district court by the principal arresting officer (App. 147-48):

> Q: All right: Isn't it true, sir, that the purpose behind your arrest of the teen-aged Browders was to bring them down to the station house to place them in a line-up?
>
> Officer Conroy: To see if they could be identified by the victim. To see which one would be identified.

[23] *Boyd v. United States*, 116 U.S. 616, 625 (1886), quoting the arguments of James Otis against reissuance of writs of assistance in Boston following the death of George II in 1761. See Wroth & Zobel (eds.), *Legal Papers of John Adams* 141-42 (1965).

> Q: At the time you arrested both Browders you didn't know which one, if either, would be the one who would be identified?
>
> A: That is correct, sir.

These warrantless (App. 73) investigatory arrests are contrary to *Davis v. Mississippi*, 394 U.S. 721 (1969), where the Court held that the Fourth Amendment prohibits the warrantless seizure of several persons merely to gather evidence to decide which one, if any, should be charged. In this case, the court of appeals sought to distinguish *Davis*—where the absence of probable cause had been conceded, 394 U.S. at 726—by finding that the investigative arrests here were based on probable cause. (App. 168.) But a conclusion that there could have been probable cause to arrest in this case would expand that "practical compromise," *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975), into a roving commission for investigative arrests, presaging "wholesale intrusions upon the personal security of our citizenry." *Davis v. Mississippi*, 394 U.S. at 726.[24]

Concluding that a warrantless arrest is permissible when, as here, several suspects are arrested "to clear up an investigation" (App. 36), allows the police to arrest "at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.' " *Mallory v. United States*, 354 U.S. 449, 456 (1957).[25] Such a function for warrantless arrests is contrary to what the Court said in *Gerstein v. Pugh*, 420

[24] Because it is apparent from the state trial record that petitioner was seized in a multiple suspect warrantless investigatory arrest, the district court was justified in granting the petition without an evidentiary hearing. See *Brewer v. Williams*, —U.S.—, —, —, 97 S.Ct. 1232, 1235 (1977).

[25] The court of appeals read *Mallory v. United States, supra*, as not prohibiting multiple suspect arrests for investigation. (App. 167.) This analysis disregards the purpose of the exclusionary rule applied in *McNabb v. United States*, 318 U.S. 332 (1943), and re-applied in *Mallory*, i.e., to deter arrests for questioning.

U.S. 103 (1975): "[A] policeman's on the scene assessment of probable cause provides legal justification for arresting a person suspected of a crime, and for a brief period of detention *to take administrative steps incident to arrest.*" Id. at 113–14. (emphasis supplied) The blatantly investigative arrest sanctioned by the court of appeals in this case "collides violently with the basic human right of liberty," and "can be tolerated only in a society which is willing to concede to its government powers which history and experience teach are the inevitable accoutrements of tyranny."[26]

An arrest is a significant intrusion upon personal liberty. "It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows." *Terry v. Ohio*, 392 U.S. 1, 26 (1968). "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends." *United States v. Marion*, 404 U.S. 307, 320 (1971). Little reminder is needed that an arrest "is abrupt, is effected with force or threat of it, and [occurs] often in demeaning circumstances." *United States v. Dionisio*, 410 U.S. 1, 10 (1973), quoting from *United States v. Doe (Schwartz)*, 457 F.2d 895, 898 (2d Cir. 1972). In addition, an arrest record may adversely affect present or future employment. See *Menard v. Saxbe (II)*, 162 U.S.App.D.C. 284, 290-91, 489 F.2d 1017, 1023–24 (1974). Finally, investigative arrests are the type of "police excesses [which] bear the seed of untoward counter reactions of violence." *Lankford v. Gelston*, 364 F.2d 197, 204 n. 7 (4th Cir. 1966).

In some societies, arrests are used as "alternative means to deal with persons who cannot be successfully prosecuted

[26] Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 Geo.L.J. 1, 22 (1958).

for their activities, though they are a menace to public security and order." Gledhill, *Fundamental Rights in India* 127 (1955).[27] In the Soviet Union, "arrests occur in the form of 'campaigns' which represent a concentrated effort by the regime to solve some pressing political or social problem." Bauer, *Arrest in the Soviet Union* 1 (1954). See also Lowry, *Internment: Detention without Trial in Northern Ireland*, 5 Human Rights 261 (1976). As Mr. Justice Jackson wrote shortly after his return from the Nuremberg trials:

> Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police. *Brinegar v. United States*, 338 U.S. 160, 180–81 (1949) (dissenting opinion)

In our system, crimes may not be solved by a call to "round up the usual suspects." This is so because "there is no legal basis for arresting persons simply as a means of detaining them while an investigation of their possible involvement in a crime is conducted."[28] Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169 (1972).

[27] As quoted in Bayley, *Preventive Detention in India* 75 (1962).

[28] President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* 186 (1967); See, e.g., *Henry v. United States*, 361 U.S. 98 (1959); *Terry v. Ohio*, 392 U.S. 1 (1968); *Davis v. Mississippi*, 394 U.S. 721 (1969); *United States v. Ortiz*, 422 U.S. 891 (1975).

Legitimizing investigative arrests reduces the Fourth Amendment to "little more than rhetoric,"[29] and undermines the integrity of the fact finding process at any subsequent criminal prosecution. Investigatory seizures are planned "in the hope that something will turn." *Brown v. Illinois*, 422 U.S. 590, 605 (1975). To insure that "something will turn up," prompt presentment statutes are ignored[30] so that the police may convince a suspect to "waive" his *Miranda* rights.[31] This is precisely the factual setting of *Brown v. Illinois*, 422 U.S. 590 (1975). The result is little different than that condemned more than forty years ago in the Wickersham Commission Report on coercive interrogation procedures. Chafee, Pollak and Stern, *The Third Degree* (Arno ed. 1969).

In addition to producing, as in this case, an oral confession of disputed authenticity, investigative arrests will often result, as here, in corporeal identification procedures held prior to

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[29] *Bivens v. Six Unidentified Agents*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) The decision below first eliminates any deterrent from exclusion of the fruits of investigative arrests. See *Brown v. Illinois*, 422 U.S. 590 (1975). Second, the decision below, by finding "probable cause" for investigative arrests, creates a "good faith" defense to any action for money damages. *Pierson v. Ray*, 386 U.S. 547 (1967).

[30] See Note, *Admissibility of Confessions Obtained Between Arrest and Arraignment: Federal and Pennsylvania Approaches*, 79 Dick.L.Rev. 309, 341-42 (1974); Hopkins, *Our Lawless Police* 65 (1931) ("And the winnowing process–the delayed appearance in court, the incommunicado, the third degree–is a further extension of an unlawful series implied or necessitated by the initial illegality.")

[31] See Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later–Some Comments on a Remarkable Article*, 73 Mich.L.Rev. 15, 28 (1974):

> Allowing the police to give legal advice to, and obtain "waivers" from suspects outside the presence of any judicial officer is troublesome enough. . . . The problem is aggravated when, even though feasible, no stenographic transcript (let alone an electronic recording) of the "waiver transaction" need be made; when–as most lower courts have held–the police officer's disputed and uncorroborated recollections of the "waiver" event suffice. . . .

the formal "initiation of adversary judicial criminal procedures." *Kirby v. Illinois*, 406 U.S. 683, 689 (1972). The result is that counsel is not available to be a witness to any unfairness in the identification procedure–an important role stressed by the Court in *United States v. Wade*, 388 U.S. 218, 231-37 (1967).[32]

The decision of the court of appeals in this case does not encourage the "development of rational alternatives" to the exclusionary rule. See *Stone v. Powell*, 428 U.S. 465, 500 (1976) (Burger, C.J., concurring). To the contrary, the decision below encourages "police use of unnecessarily frightening or offensive methods of surveillance and investigation," activities prohibited by the Fourth Amendment. *United States v. Ortiz*, 422 U.S. 891, 895 (1975). Accordingly, the decision below must be reversed, and the case remanded to the district court for reinstatement of its writ of habeas corpus.

C.

PRIOR RECOURSE TO A DISINTERESTED JUDICIAL OFFICER IS REQUIRED BEFORE POLICE OFFICERS MAY, ABSENT EXIGENT CIRCUMSTANCES, SEARCH A DWELLING TO SEIZE SUSPECTS.

A search warrant plainly would have been required if the police in this case had entered the Browder residence to seize physical evidence. "The search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our

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[32] In petitioner's appeal from the denial of state collateral relief, the Illinois Appellate Court rejected our argument that *Kirby v. Illinois, supra*, requires counsel at a post-arrest lineup held when, as here, formal charges should have been, but were not, filed. (App. 108.) The same result has recently been reached by the Seventh Circuit, *United States ex rel. Burbank v. Warden*, 535 F.2d 361, 370 (7th Cir. 1976).

laws."[33] The police had ample opportunity to seek a warrant, and there were absolutely no circumstances requiring prompt action.[34] Had recourse been made to "a magistrate to pass on the desires of the police before they violate the privacy of the home," *McDonald v. United States*, 335 U.S. 451, 456 (1948), the blatantly investigative arrests and the night-time invasion of the Browder dwelling would not have occurred.

Even a court clerk,[35] presented with the facts set out in Conroy's report (App. 159), would have ruled that "information from a known informer" could not justify the night-time search of a dwelling to seize four suspects to determine which one should be charged for an offense committed two days before. Even if the police could have articulated facts to show that the offender sought was "a teen-aged Browder, like 15, 16, 17, 18" (App. 146), a disinterested judicial officer would not have authorized a night-time search of the Browder

[33] *Agnello v. United States*, 269 U.S. 20, 32 (1925); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Johnson v. United States*, 333 U.S. 10 (1948); *Mancusi v. DeForte*, 392 U.S. 364 (1968); *See v. City of Seattle*, 397 U.S. 541 (1967); *G.M. Leasing Corp. v. United States* —U.S.—, 97 S.Ct. 619 (1976).

[34] There was no need for prompt action because the search and seizure was based on information which the police claimed to have received on January 29, 1971 (App. 129-30), but which was not acted upon until two days later. (App. 135.) This delay conclusively shows the absence of exigent circumstances. *G.M. Leasing Corp. v. United States*, ––U.S.––, 00-00, 97 S.Ct. 619, 631-32 (1976).

Nor had the officers perceived any need for prompt action. Officer Conroy claimed to have telephoned the Browder residence in advance, and "knew the gentlemen would be waiting." (App. 63.) Thus, the police perceived "no probability of a material change in the situation during the time necessary to secure [a] warrant." *Taylor v. United States*, 286 U.S. 1, 6 (1932). Accordingly, there were no exigent circumstances to excuse the need for a warrant. See *Coolidge v. New Hampshire*, 403 U.S. 443, 460-64 (1971).

[35] Cf. *Shadwick v. City of Tampa*, 407 U.S. 345 (1972) (court clerk may issue warrants for ordinance violations)

residence to seize "all teen-aged males whose surname is Browder." Such a warrant would have contravened the requirement of the Fourth Amendment[36] that a warrant particularly describe the things to be seized so that "nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196 (1927). Just as "[t]he fact that packages have been stolen does not make every man who carries a package subject to arrest nor the package subject to seizure," *Henry v. United States*, 361 U.S. 98, 104 (1959), so too the fact that a teen-aged male whose surname is Browder may have committed an offense does not subject to arrest all teenagers whose surname is Browder: The police must have reasonable grounds to believe that a particular teen-aged Browder has committed that offense. See *ante* at 28-30.

In this case, any application for a warrant would have been refused, and the police advised to continue their investigation. See *United States v. Watson*, 423 U.S. 411, 455 n. 22 (1976) (Marshall, J., dissenting). In some jurisdictions, upon a showing that the offender sought was one of several persons, the police could have made recourse to a "narrowly circumscribed procedure" as suggested by the Court in *Davis v. Mississippi*, 394

[36] "The Fourth Amendment commands that a warrant issue not only upon probable cause . . . but also 'particularly describing the place to be searched, and the persons or things to be seized!" *Berger v. New York*, 388 U.S. 41, 55 (1967).

U.S. 721, 728 (1969).[37] But the unresolved question of whether such a procedure is consistent with the Fourth Amendment, *United States v. Dionisio*, 410 U.S. 1, 11 (1973), is not presented in this case; as in *Davis v. Mississippi, supra*, "it is clear that no attempt was made here to employ procedures which might comply with the requirements of the Fourth Amendment: the detention at police headquarters of petitioner and the other young Negroes was not authorized by a judicial officer . . ." *Id.* at 728.

This Court has repeatedly reserved the question of whether a warrant is required to search a dwelling when the seizure of a person–rather than "papers and effects"–is sought.[38]

[37] An investigative detention pursuant to such a "narrowly circumscribed procedure" is a significantly less intrusive invasion of privacy than a night-time dwelling search and arrest.

The model statute set out in Article 170 of the ALI, A Model Code of Pre-Arraignment Procedure (1975) allows a judicial official to issue a "nontestimonial identification order" upon a particularized showing of need. Sec. 170.2. This order is to be served on a week-day between 8:00 a.m. and 8:00 p.m. (Sec. 170.5(2)), and may be challenged prior to an appearance. (Sec. 170.3(k).) In addition, a change in the "time, place or method" of appearance may be requested. (Sec. 170.4.) Each of these rights, and a specific warning that the suspect need not respond to any interrogation (Sec. 170.3(k)) is included in the order to appear. (Sec. 170.3.)

Similar procedural safeguards are to be found in the statutes and court decisions adopting such "narrowly circumscribed procedures." See, e.g., Ariz. Rev. Stat. Ann. §13-1424 (1973 supp.); Idaho Code §19-625 (1976 supp.); N.C. Gen. Stat. §15A-271 et seq.; *Wise v. Murphy*, 275 A.2d 105 (D.C.App. 1971) (in banc); *In re Fingerprinting of M.B.*, 125 N.J.Super. 115, 309 A.2d 3 (1975); *United States v. Greene*, 139 U.S.App.D.C. 193, 429 F.2d 193 (1970). Cf. *State v. Bell*, 334 So.2d 385 (La. 1976) (accused free on bail, may only be ordered to appear for a lineup upon finding by court that appearance would be "just and reasonable.")

[38] See, e.g., *Jones v. United States*, 357 U.S. 493, 499-500 (1958); *Coolidge v. New Hampshire*, 403 U.S. 443, 480-81 (1971); *United States v. Watson*, 423 U.S. 411, 418 n. 6 (1976); *United States v. Santana*, 427 U.S. 38 (1976). Cf. *Warden v. Hayden*, 387 U.S. 294 (1967); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

Each item, of course, is specifically enumerated in the Fourth Amendment, and it should be of no consequence that a dwelling search is made to seize persons, rather than to seize "papers and effects."[39] As the Court has noted in a different context, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). This is especially true with respect to the Fourth Amendment, which "protects people–and not simply 'areas'–against unreasonable searches and seizures." *Katz v. United States*, 389 U.S. 347, 353 (1967).

In *Camara v. Municipal Court*, 387 U.S. 523 (1967) the Court held that "the purposes behind the warrant machinery contemplated by the Fourth Amendment," Id. at 532, prohibit warrantless dwelling entries to search for building code violations. *Id.* at 534. As in *Camara v. Municipal Court, supra*, allowing police to enter dwellings to search for and to seize persons in the absence of an emergency vests the police with "precisely the discretion to invade property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search." *Id.* at 532-33.

[39] In this case, the search of the Browder residence was an essential prerequisite to the seizure of the four "suspects." The physical description of the offender sought was too vague to allow an arrest on sight, as in *United States v. Watson*, 423 U.S. 411 (1976), and the police could not have maintained surveillance of the home until the suspect sought emerged. Compare *United States v. Santana*, 427 U.S. 38, 45 (1976) (Stevens, J., concurring).

In these circumstances, what was said in *Morrison v. United States*, 104 U.S. App.D.C. 352, 355, 262 F.2d 449, 452 (1958) is applicable here:

> The police entered the house to make a search. It was, to be sure, a search for a person rather than the usual search for an article of property, but it was a search. . . . The government urges that . . . we apply the rules governing arrest. But the search was a factual prerequisite to an arrest; it was the first objective of the entry; the officers did in fact search the house. They entered to make a search as a necessary prerequisite to possible arrest.

The lower federal courts which have considered this question have in general held that exigent circumstances on a warrant is required before police may enter a dwelling to arrest, following the reasoning of the unanimous in banc court of appeals for the District of Columbia in *Dorman v. United States*, 140 U.S.App.D.C. 313, 435 F.2d 385 (1970).[40] The state courts have reached similar results.[41]

At the present time, the only practical incentive for law enforcement officials to adhere to the standards of the Fourth Amendment is the deterrent sanction of the exclusionary rule. But merely excluding the fruits of an unlawful arrest from use at trial has an uncertain effect in deterring future police misconduct. *United States v. Janis*, 428 U.S. 433, 450 n. 22 (1976). This is especially true when, as here, the totality of state procedures postpone adjudication of the Fourth Amendment issue until the prisoner has exhausted state remedies and reaches the federal courts. See *Stone v. Powell*, 428 U.S. 465, 493-94 (1976), discussed *infra* at 40-50. Finally, exclusion of the fruits of an unlawful arrest provides no redress for persons who are arrested in a dragnet, but, as here, are released after "processing." In contrast to the limited reach of the exclusionary rule, the warrant clause of the Fourth Amendment, by its very operation, deters wrongful police conduct and protects Fourth Amendment rights generally.

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[40] See, e.g., *Vance v. North Carolina*, 432 F.2d 984 (4th Cir. 1970); *United States v. Shye*, 492 F.2d 1131 (6th Cir. 1974); *United States v. Phillips*, 497 F.2d 1131 (9th Cir. 1974).

[41] See, e.g., *People v. Ramey*, 16 Cal.3d 263, 127 Cal.Rep. 629, 545 P.2d 1333 (1976); *People v. Moreno*, 176 Colo. 488, 490 P.2d 575 (1971); *State v. Lasley*, ––Minn.––, 236 N.W.2d 604 (1975); *People v. Wolgemuth*, 43 Ill.App.3d 335, 356 N.E.2d 1139 (1976), appeal allowed, No. 49149, March Term, 1977, 66 Ill.2d; *State v. Girard*, 276 Or. 511, 555 P.2d 445 (1976); *Commonwealth v. Ford*, ––Mass.––, 329 N.E.2d 717 (1975); *State v. Johnson*, 232 N.W.2d 477 (Iowa, 1975). *Contra, State v. Perez*, 277 So.2d 778 (Fla. 1973).

In order to provide the greatest protection against recurrence of the egregious police misconduct apparent in this case,[42] the Court should hold that prior recourse to a disinterested judicial officer is required whenever there are no exigent circumstances and law enforcement officials wish to enter a dwelling to arrest. Such a holding would require that the decision of the court of appeals be reversed.

D.

HABEAS CORPUS RELIEF WOULD NOT BE PRECLUDED BY *STONE v. POWELL*, 428 U.S. 465 (1976).

For several reasons, *Stone v. Powell*, 428 U.S. 465 (1976) is no bar to habeas corpus relief in this case. First, the totality of state procedures failed to provide petitioner with "an opportunity for full and fair litigation of [his] Fourth Amendment claim." *Id.* at 494. Second, even if the state had provided petitioner with a "full and fair opportunity," but had nonetheless misconceived the Fourth Amendment and denied relief, a federal remedy would be required because of the flagrancy

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[42] Requiring warrants in the circumstances of this case will also improve the reliability of the fact-finding process: When an arrest is made under a warrant, adversary judicial proceedings have commenced, and a suspect is entitled to counsel at a post-arrest lineup. *United States ex rel. Robinson v. Zelker*, 468 F.2d 159 (2d Cir. 1972); *People v. Hinton*, 23 Ill.App.3d 369, 319 N.E.2d 313 (1974).

of the Fourth Amendment violation–not present in *Stone v. Powell*–which underlies this case.[43]

1.

The absence of "full and fair litigation" in the state courts.

The *sine qua non* of *Stone v. Powell*, 428 U.S. 465 (1976)–that "the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim," *Id.* at 494–is plainly lacking in this case. Because appointed trial counsel failed to raise the Fourth Amendment claim "in the trial court, either during the trial or in the motion or argument for a new trial" (App. 9), the state courts refused to adjudicate that issue,

[43] If, as we have argued (*ante* at 19-23), notice of appeal was not timely filed, the order granting the petition has become a "final judgment" for retroactivity purposes. *Linkletter v. Walker*, 381 U.S. 618, 622 n. 5 (1965). The question of whether *Stone v. Powell, supra*, is to be afforded full retroactive effect has yet to be considered by any of the courts of appeals, see *United States ex rel. Saiken v. Bensinger*, 546 F.2d 1292, 1295 (7th Cir. 1976), and absent a cross-petition for certiorari should not be considered for the first time in this case. We note, however, that retroactive application of *Stone v. Powell* would undo the grants of relief in *Whiteley v. Warden*, 401 U.S. 560 (1971), *Lefkowitz v. Newsome*, 420 U.S. 283 (1975), along with countless other cases. Such retroactive application would be contrary to *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

either on direct appeal or in state collateral proceedings.[44] The result, as recognized by the Director in the district court (App. 119, ¶5), is that the "issue of probable cause was never litigated" in state court proceedings.

The state courts did not rely on any tactical basis for the failure of trial counsel to have raised the Fourth Amendment issue, but merely followed the state practice of refusing to allow an inquiry into the "judgment and discretion" of trial counsel.

[44] On direct appeal, the Illinois Appellate Court rejected petitioner's attempt to raise the Fourth Amendment issue as plain error. (App. 9-11.) Petitioner challenged this application of the state waiver rule in his petition for review to the Illinois Supreme Court (App. 16), arguing that when "defense counsel inadvertently failed to pinpoint the unlawful arrest as the basis of the motions to suppress the fruits of the arrest," the waiver rule applied by the appellate court improperly "denied defendant a fair opportunity to raise and have adjudicated on direct appeal his Fourth Amendment claims, when the factual basis for these claims is clear from the trial court record." (Ibid.) Review was denied without opinion. 54 Ill.2d 597 (1973).

Petitioner also sought to adjudicate the Fourth Amendment issue in the state courts through the Illinois Post-Conviction Hearing Act, Ill.Rev.Stat. ch. 38, §122-1 et seq. The trial court dismissed the petition without the reception of evidence. The Illinois Appellate Court affirmed, holding that there could not be "any further consideration" of the unlawful arrest issue because it had been raised, albeit not adjudicated, on direct appeal (App. 108):

> Petitioner having argued in his direct appeal that his arrest was illegal and that all things flowing therefrom should have been suppressed is now barred from any further consideration of that issue in post-conviction proceedings by the doctrine of res judicata.

This "doctrine of res judicata" renders the Illinois post-conviction procedure ineffective to protect a prisoner's rights. See *United States ex rel. Williams v. Brantley*, 502 F.2d 1383 (7th Cir. 1975).

People v. Newell, 48 Ill.2d 392, 397, 268 N.E.2d 17, 19 (1971).[45] In these circumstances, *Henry v. Mississippi*, 379 U.S. 443 (1965) requires that

> [P]etitioner could have a federal court apply settled principles to test the effectiveness of the procedural default to foreclose consideration of his constitutional claim. If it finds the procedural default ineffective, the federal court will itself decide the merits of his federal claim, at least as long as the state court does not wish to do so. *Id.* at 452.

This is precisely what happened in this case. On consideration of petitioner's application for a writ of habeas corpus, the district court found that "no reasonable tactical basis is apparent to justify the failure to object [to the illegality of the arrest]." (App. 113.) Then, after finding that the procedural default was ineffective to foreclose consideration of the Fourth Amendment claim, the district court turned to the merits of that issue. (Ibid.)[46]

The district court's finding that there was "no reasonable tactical basis" for the failure of trial counsel to have raised the Fourth Amendment claim at trial has never been challenged by the Director, and therefore need not be reconsidered here.

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[45] This rule is illustrated in the disposition of petitioner's claim, advanced in the state post-conviction proceeding, that trial counsel was incompetent in failing to call alibi witnesses, a defect in the defense case which was vigorously argued to the jury by the prosecution. (App. 99-100). The trial court refused to hold a hearing on petitioner's averment that he had told trial counsel about these witnesses prior to trial. (App. 107.) The Illinois Appellate Court affirmed, holding "that the failure to call the alibi witnesses was a matter of trial tactics and does not demonstrate incompetency of counsel." (Ibid.)

[46] Cf. *Tollett v. Henderson*, 411 U.S. 258, 268 (1973) (After plea of guilty, federal habeas corpus relief on claim of unconstitutional discrimination in selection of grand jurors requires proof of such discrimination and a showing "that his attorney's advice to plead guilty without having made inquiry into the composition of the grand jury rendered that advice outside the 'range of competence demanded of attorneys in criminal cases.' ")

Strunk v. United States, 412 U.S. 434, 437 (1973). But a belated claim of error in this regard would be without merit.

Prior to trial, defense counsel sought to suppress the oral confession and to bar the use of identification testimony. (App. 17-18, 19.) While these motions did not raise the illegality of petitioner's arrest as a basis for suppression, the facts pertaining to the arrest should have been known to counsel from conversations prior to trial with his client,[47] and from a pre-trial investigation.[48] Even without any trial preparation whatsoever, evidence adduced at the hearing on the pre-trial motions demonstrated the non-frivolity of a claim that petitioner had been unlawfully arrested and that the confession and testimony about the lineup identification were the tainted fruits of that arrest.[49]

Trial strategy adopted by defense counsel was to convince the jury that the identification testimony was unreliable, and to urge the jury to reject as not credible police testimony about the existence of an oral confession. (App. 51.) For reasons that are at best obscure, trial counsel repeatedly returned to the circumstances of the arrest during his cross-examination of prosecution witnesses at trial. (App. 58-59, 63, 67, 72-73, 81-82.) But this evidence was used neither as the basis of a renewed motion to suppress, nor as a means of evoking sympathy from the jury: After the prosecution had

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[47] The motion to suppress the oral confession reveals that counsel at least knew where and when petitioner had been arrested. (App. 17, ¶1.)

[48] See A.B.A. Standards Relating to the Administration of Criminal Justice, *The Defense Function* §3.6(a) (1972).

[49] Testimony at the hearing on the pre-trial motions revealed that petitioner had been arrested on the basis of information about "a possible offender by the name of Browder" (App. 21), that this information resulted in the arrest of all the teen-age males found at the Browder residence, including two persons whose surname was not Browder (App. 29), that the arrestees had all been charged with "investigation of rape," (App. 30), and that the arrests had been made so that the police "could clear up the investigation." (App. 36)

made its closing argument, defense counsel waived final argument. (App. 101.)[50]

In this case, it might well be that the performance of trial counsel could provide a basis for habeas corpus relief under the Sixth Amendment. See *Cooper v. Fitzharris*, 551 F.2d 1162 (9th Cir. 1977).[51] But the Court need not decide in this case whether the failure of trial counsel to have raised the Fourth Amendment issue would justify relief irrespective of the merits of that claim—even if petitioner did receive the effective assistance of counsel required by the Sixth Amendment, the non-tactical failure of trial counsel to have raised the obvious Fourth Amendment claim, coupled with the refusal of the state courts to excuse that default, deprived petitioner of the "opportunity for full and fair litigation of a Fourth Amendment claim," required by *Stone v. Powell*, 428 U.S. at 494.

Stone v. Powell should not be extended to allow a state to first furnish an indigent accused with trial counsel who fails to recognize an obvious Fourth Amendment claim and then to deny the accused an opportunity to adjudicate that claim because, through negligence or inadvertence, counsel failed to raise the issue at trial. Such would be the situation in this case

[50] Cf. *Herring v. New York*, 422 U.S. 853, 858 (1975) ("Closing argument for the defense is a basic element of the adversary fact-finding process in a criminal trial.")

[51] "If the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel." *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

Counsel, of course, has a duty to remain abreast of developments in the law, Ethical Consideration 6-2, *A.B.A. Code of Professional Responsibility* (1970), and we note that in two other Illinois cases from the same time period which have reached this Court, trial counsel did in fact seek to suppress intangible evidence as the tainted fruit of an unlawful arrest. See *Brown v. Illinois*, 422 U.S. 590 (1975); *Kirby v. Illinois*, 406 U.S. 682 (1972). Cf. *People v. Bean*, 121 Ill.App.2d 332, 257 N.E.2d 562 (1971) (reversing conviction of Kirby's co-defendant on the basis of *Wong Sun v. United States*, 371 U.S. 471 (1972))

if the Court is to hold that habeas corpus relief may be withheld from petitioner. As the lower federal courts have held,[52] *Stone v. Powell* should not be extended to reach such a result.

2.

Stone v. Powell should not be extended to a case involving flagrant police misconduct which results in evidence of inherent untrustworthiness.

Even if petitioner has received a "full and fair opportunity" to litigate his Fourth Amendment claim in the state courts, *Stone v. Powell*, 428 U.S. 465 (1976) should not be extended to preclude a federal remedy for flagrant violations of the Fourth Amendment which result in evidence of inherent untrustworthiness.

The cases consolidated in *Stone v. Powell* arose from attempts by two prisoners to collaterally attack their state court convictions, based on "typically reliable" physical evidence, 428 U.S. at 490, which had been seized as the result of good faith violations of the Fourth Amendment. Respondent Powell had been arrested for violation of a vagrancy ordinance which was later held to be unconstitutional. *Id.* at 470-71. In the search incident to Powell's arrest, the police discovered a handgun. *Id.* at 469. This weapon was used to show that Powell had committed a murder. *Id.* at 470. Respondent Rice complained of the admission into evidence against him of "dynamite, blasting caps, and other materials useful in the construction of explosive devices," *Id.* at 472, which had been

[52] See, e.g., *Gates v. Henderson*, —F.2d— (No. 76-2065, 2d Cir., January 12, 1977); *O'Berry v. Wainwright*, 546 F.2d 1204, 1213 (5th Cir. 1977); *Sosa v. United States* 550 F.2d 244, 249 (5th Cir. 1977); *United States ex rel. Wilson v. Warden*, —F.Supp.— (No. 75 C 3776, N.D. Ill., March 22, 1977).

found in plain view when police officers were executing a search warrant. *Id.* at 472. This warrant was subsequently held to have been issued without probable cause. *Id.* at 473–74.

In these situations, the Court held that application of the exclusionary rule would have only a minimal impact towards deterring police lawlessness, and would not further the "imperative of judicial integrity," because the police had acted in a good faith belief that their conduct was lawful. *Id.* at 485 n. 23.

In contrast to the fact situations before the Court in *Stone v. Powell*, this case arises from a warrantless night-time invasion of a dwelling–the "evil in its most obnoxious form"[53] addressed by the Fourth Amendment. There was no emergency justifying the invasion of the home, nor was there probable cause to seize any particular person found within that house. The purpose of the warrantless search and seizure is clear–to see which, if any, of the persons seized would be identified at a lineup. As we have previously demonstrated, this search and seizure is reminiscent of the indiscriminate and discretionary seizures that would be made under the general warrants emphatically proscribed by the Fourth Amendment. See *ante* at 27-41.

Nor did the search and seizure in this case result in "the most probative information bearing on the guilt or innocence of the defendant." 428 U.S. at 490. Unlike the "typically reliable" physical evidence in *Stone v. Powell, Ibid.*, the search and seizure in this case resulted in an oral confesssion of disputed existence, and an eyewitness identification made at an unnecessarily suggestive lineup.[54]

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[53] *Monroe v. Pape*, 365 U.S. 167, 210 (1961) (Frankfurter, J., dissenting).

[54] Petitioner denied that he had made an oral confession. (App. 84.) The police admitted that no attempt had been made to obtain a written confession. (App. 82.)

Petitioner was the only person in the lineup wearing a white hat. (App. 20-21, 73.) In addition, he was the only person with a bandage or cast on his right hand. (App. 20, 25.) Testimony was in conflict as to whether the lineup had been viewed by eyewitnesses simultaneously (App. 19) or separately. (App. 23, 26.)

The plainly unlawful search and seizure in this case requires "significantly different judicial responses" than in *Stone v. Powell.* See *Brown v. Illinois*, 422 U.S. 590,610 (1975) (Powell, J., concurring). The police conduct in this case is such that "the deterrent value of the exclusionary rule is most likely to be effective, and the corresponding mandate to preserve judicial integrity . . . most clearly demands that the fruits of official misconduct be denied." *Id.* at 611. If, under the facts of this case, the state courts so misconstrue the Fourth Amendment as to deny relief, warrantless investigatory arrests would be encouraged by police knowledge that the state courts will not bar the use at trial of anything that "turns up" in those arrests. *Brown v. Illinois*, 422 U.S. at 602, 605. This Court's certiorari jurisdiction does not provide an effective mechanism to correct the state courts' errors. Review in this Court "depends on numerous factors other than the perceived correctness of the judgment we are asked to review," *Ross v. Moffitt*, 417 U.S. 600, 617 (1974), and a state need not assist an indigent prisoner in seeking review in this Court. *Id.* at 618. Under the circumstances of this case, even if the "search and seizure claim was erroneously rejected by two or more tiers of state courts," *Stone v. Powell*, 428 U.S. at 491, "further review of the Fourth Amendment claim will likely contribute to the deterrent purpose of the exclusionary rule more than it will increase the societal costs which always attend the rule." *Pope v. Parratt*, ––F.Supp.––, –– (No. CF75-L-105, D.Neb., April 18, 1977).

Enforcement of the Fourth Amendment's proscription of general warrants is too important to be delegated to the exclusive province of the state courts, subject only to the possibility that a *pro se* prisoner will be successful in invoking this Court's discretionary jurisdiction. The core of the Fourth Amendment is of sufficient importance so that what Mr. Justice Frankfurter wrote in *Brown v. Allen*, 344 U.S. 456 (1953) is applicable here:

> The State court cannot have the last say when it, though on fair consideration and what procedurally may be

deemed fairness, may have misconceived a constitutional right. *Id.* at 508.

For these reasons, even if petitioner has received the "full and fair" opportunity required by *Stone v. Powell*–which petitioner clearly did not receive–federal habeas corpus relief should not be withheld as a remedy for the flagrant police misconduct apparent in this case.

IV.

A FEDERAL COURT OF APPEALS LACKS THE POWER TO WITHHOLD ANY OF ITS OPINIONS FROM PUBLICATION AND TO *A PRIORI* DEPRIVE SUCH UNPUBLISHED OPINIONS OF PRECEDENTIAL VALUE.

This is the first case to reach the Court where the propriety of a circuit rule authorizing dispositions in unpublished orders which may not be cited as precedent in subsequent cases is squarely at issue.[55] In this case, after the court of appeals had announced its decision in an "unpublished order," petitioner requested that the opinion be released for publication. (App. 170–71.) This motion was denied without explanation. (App. 172.)

Prior to this case, recurring problems in "not for publication rules"–which have been adopted by all of the courts of

[55] A comprehensive amicus brief, which does not duplicate our arguments, has been filed on this issue by the Chicago Council of Lawyers.

appeals[56]–have evaded review.[57] At least one of these problems, i.e., whether "unpublished opinions" are truly non-precedential, has injured petitioner in this case. As we pointed out in our petition for re-hearing in the court of appeals, is it at least arguable that the panel discussion is contrary to prior decisions of the Seventh Circuit. (Pet. for Re-hearing, No. 76-1089, 7th Cir., 2-3, 9-11.) Given the "non-precedential" status of unpublished opinions, there was little incentive for the in banc court to convene, and in fact the court denied re-hearing without ordering a response.

It is also conceivable that among the unpublished opinions of the court of appeals there is additional precedent contrary to the panel opinion in this case. But there is no index of unpublished opinions available to the public,[58] and even if we

[56] First Circuit, Appendix B to Circuit Rules; Second Circuit Rule .23; Third Circuit, Int. Op. Proc., Rule D; Fourth Circuit Rule 18; Fifth Circuit Rule 21; Sixth Circuit Rule 11; Seventh Circuit Rule 35; Eighth Circuit Rule 14; Ninth Circuit Rule 21; Tenth Circuit Rule 17; D.C. Circuit Rule 13.

[57] See *Taylor v. McKeithen*, 407 U.S. 191 (1972) (reversal without opinion remanded with "virtually [an] express directive to the Court of Appeals that it write an opinion," *Id.* at 195 (Rehnquist, J., dissenting)); *Rose v. Hodges*, 423 U.S. 19 (1975) (intra-circuit conflict between decisions reached in published and unpublished decisions, the Court refusing to "respect that prohibition" of citation of unpublished decisions. *Id.* at 23 n. 2 (Brennan, J., dissenting))

[58] There may well be "some kind of intracourt index of unpublished opinions, indexed according to the subject matter and so forth." Testimony of Honorable Robert Sprecher, Judge, Seventh Circuit, in *Commission on Revision of the Federal Court Appellate System, Hearings–Second Phase 1974-1975*, Vol. I, 1974, at 536. If such an index exists, it is not available to the public.

could have found a favorable unpublished opinion, citation would have been prohibited by the local rule.[59]

The unpublished opinion rules are based upon guidelines developed by an *ad hoc* "group of distinguished lawyers, law teachers, and judges" brought together in 1972 by the Federal Judicial Center "for the purpose of commencing a study in depth of the appellate systems of the United States, both state and federal."[60] The committee determined that the efficiency of intermediate appellate courts would be increased if opinion writing was simplified, and recommended that the highest court in each judicial system promulgate a uniform rule for the disposition of appeals by intermediate reviewing courts in unpublished, and non-citable opinions. See *Standards for Publication of Judicial Opinions*, Federal Judicial Research Center Series No. 72-3 (1973).

This Court has declined to promulgate a uniform rule.[61] The result is that "undesirable variations [have been introduced] within the system." *Standards for Publication of Judicial Opinions*, supra, 9. In the Fourth and Tenth Circuits unpublished opinions may be cited as precedent.[62] Rule 21

[59] Circuit Rule 35(b) (2) (iv) prohibits citation of unpublished orders "[e]xcept to support a claim of res judicata, collateral estoppel or law of the case . . . (a) in any federal court within the circuit in any written document or in oral argument; or (b) by any such court for any purpose." See *United States v. Erving*, 388 F.Supp. 1011, 1017 (D.Wis. 1975) (refusing to consider decision in unpublished order, even when "[n]o other relevant decision of the United States Court of Appeals for the Seventh Circuit has been cited by counsel, nor am I aware of any.")

[60] Preface to *Standards for Publication of Judicial Opinions, Opinions*, Federal Judicial Research Center Series No. 72-3 (1973). "Those who attended the first conference named themselves the Advisory Council on Appellate Justice and selected as Chairman Maurice Rosenberg, Nash Professor of Law at Columbia University." *Ibid.*

[61] The rules promulgated by each circuit are in response to a recommendation of the Judicial Conference. See Report of the Proceedings of the Judicial Conference of the United States, October 26-27, 1972, p. 33.

[62] Fourth Circuit Rule 18(d) (iii); Tenth Circuit Rule 17(c).

of the Fifth Circuit provides that unpublished opinions are non-precedential, but a panel of that court has recently held that a decision in an unpublished opinion "precludes the matter as far as this panel is concerned, and that any meaningful consideration of the argument could be given only by the Court sitting en banc." *United States v. Ellis*, 547 F.2d 863, 869 (5th Cir. 1977) (Roney, J., concurring). In the remaining circuits, decisions by unpublished order may not be cited, and are "non-precedential." Thus, when, as in this case, a panel reaches a result which is arguably in conflict with prior decisions, there is little, if any, incentive for the in banc court to convene to correct such a "non-precedential" departure from prior decisions.

Allowing the citation of "unpublished opinions"—the approach of the Fourth and Tenth Circuits—has recently been adopted in the A.B.A. *Standards Relating to Appellate Courts* (1977), §3.37(c). One danger in this approach is that unpublished opinions will become "like unexploded land mines, ready to do damage." Karlen, *Appellate Courts in the United States and England*, 100 (1963).

The alternative approach—that of prohibiting citation—is contrary to *Hicks v. Miranda*, 423 U.S. 332 (1975): Assuming that a court has jurisdiction over a case, any adjudication is an adjudication on the merits, and is entitled to precedential effect. *Id.* at 344. While it has been vigorously suggested that *Hicks* be reconsidered,[63] the Court has declined to do so. The result is that only when the Court's jurisdiction is discretionary, as in acting upon petitions for review by certiorari, does a disposition have no precedential value. Unlike the discretionary certiorari jurisdiction of this Court, the courts of appeals lack the power to decide which cases to decide on the merits. *Garrisson v. Patterson*, 391 U.S. 464 (1968). The presumed existence of such a power is at the heart of the "no-citation" rules, which must fall in light of *Hicks v. Miranda, supra.*

[63] See, e.g., *Colorado Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913 (Brennan, J., dissenting from denial of certiorari).

Nor should the power to determine which of its opinions are to be published rest in the court issuing that opinion. First, this is akin to a copyright on judicial opinions, rejected in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), and in *Banks v. Manchester*, 128 U.S. 244 (1888). Second, there is the possibility that unpublished opinions will be used "to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues." *N.L.R.B. v. Amalgamated Clothing Workers*, 430 F.2d 966, 972 (5th Cir. 1970) (Brown, C.J., cautioning against such use).[64] In addition, as Mr. Justice Stevens has observed:

> Such a rule assumes that an author is a reliable judge of the quality and importance of his own work product. If I need authority to demonstrate the invalidity of that assumption, I refer you to a citizen of Illinois who gave a brief talk in Gettysburg, Pennsylvania that he did not expect to be long remembered. Judges are the last persons who should be authorized to determine which of their decisions should be long remembered. (Address to Illinois State Bar Association's Centennial Dinner, January 22, 1977, p. 9.)

[64] See also the comments of the editors of the Selective Service Law Reporter commenting about the refusal of the district judge in *Shear v. Richardson*, 364 F.Supp. 43, 44 n. 1 (S.D.Ill. 1973) to permit the citation of *United States ex rel. Noga v. Laird*, an unpublished opinion noted in the table at 474 F.2d 1351 and reported in 6 S.S.L.R. 3277:

> . . . *Shear* presents serious questions about the wisdom of non-publication rules and their non-citation corrollaries. It would seem that such provisions strike at the very core of a common law judicial system, which necessarily depends in large measure on the development of law through case-by-case adjudication. Rules which place limits on the growth of case law should be subjected to careful scrutiny and viewed with disfavor. Furthermore, in using such devices, which in effect restrict the applicability of court decisions to the individual parties involved, courts abandon their public function and are reduced to making private rules.
>
> Invocation of these rules may also, as here, permit a judge to disregard another judge's or even his own Court of Appeals' decision without distinguishing or in any other way dealing with it except to point to its non-publication. This violation of the principle of *stare decisis* seems undesirable especially as the basis for such rules is generally judicial convenience and the need to conserve judicial resources.
>
> Finally, it might be argued that judicial decisions subject neither to public scrutiny nor to judicial evaluation may be less soundly based than those which are, as well as inconsistent with democratic principles. (6 S.S.L.R. 56-57, November 1973.)

Professor Rosenberg, who chaired the committee that proposed the *Standards for Publication of Judicial Opinions* which are the basis for the various circuit rules, has recently joined with two other scholars in writing against such a policy. Carrington, Meador & Rosenberg, *Justice on Appeal* (1976). In addition to noting the problems caused by a no-citation rule, *Id.* at 36–39,

> . . . a second reason for our rejection of it is even more central to the theme of this book. It is that non-publication inevitably reduces the visibility of the correcting function of the appeal. Over time, it must depreciate the basic function, leaving trial courts and administrative agencies more on their own, and increasing general anxiety about the integrity of the legal process at all levels. Visibility is too important to too many of our imperatives to be abandoned in favor of the limited benefits of non-publication. *Id.* at 39.

To "lighten the burden of library overgrowth," (*Id.* at 39), these scholars propose two series of law reports—one for comprehensive opinions, the other for short memorandum decisions *Id.* at 40. "[S]omeone other than the authors of the memoranda, perhaps an Official Reporter of stature (in the tradition of Edward Coke) should have the power to publish in permanent form memorandum decisions which have been improvidently classified by the court." *Id.* at 41.[65]

[65] A similar suggestion was made by Dean Pound more than thirty years ago: "A qualified and responsible reporter, having no interest except to make the reports useful to the public and the profession, could select occasional memoranda worth publishing. . . . [I]f the courts and the bar were given control of reporting, as the bar has long had control in England, a troublsome problem of the law and of the profession in America, the multiplication of reports, would be solved." Pound, *Appellate Review in Civil Cases*, 391 (1941).

In addition to these shortcomings, the unpublished opinion rules exceed the rule making powers which a court of appeals may exercise pursuant to 28 U.S.C. §2071. In contrast to the "rules for the conduct of [that court's] business" authorized by 28 U.S.C. §2071, the unpublished opinion rules have an impact upon the district courts, other courts of appeals, and upon the public in general.

In 1966, Congress amended 28 U.S.C. §2072 to vest this Court with the power to promulgate uniform rules of practice and procedure for the courts of appeals. Pub. L. 89-773, 80 Stat. 1323 (November 6, 1966). If the solution to the problem of "library overgrowth" is to be adoption of a rule allowing a court of appeals to decide which of its opinions may be published and have precedential value, then such a rule can only be promulgated by this Court, subject to the approval by Congress required by 28 U.S.C. §2072.

Unless and until such a uniform rule is promulgated and approved, the courts of appeals lack the power to designate any of their opinions as "not for publication," and as "non-precedential." Accordingly, the court below should be directed to release its decision in this case–and, by implication, its decisions in all other cases decided by "unpublished orders"–for publication free of any restrictions on citation.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the decision of the court of appeals be reversed, and the case remanded to the district court with instructions to reinstate its writ of habeas corpus. In the alternative, the case should be remanded to the district court for resolution of the disputed questions of fact resolved in the first instance by the court of appeals.

In addition, the court of appeals should be directed to release its decision in this case for publication free of any restrictions on citation.

Respectfully submitted,

KENNETH N. FLAXMAN
5549 North Clark Street
Chicago, Illinois 60640
(312) 728-3525
Attorney for Petitioner

Of Counsel:
JOHN T. MORAN
JOHN M. KALNINS
THOMAS R. MEITES
FREDERICK H. WEISBERG

June, 1977

APPENDIX

Circuit Rule 35 of the United States Court of Appeals for the Seventh Circuit

Circuit Rule 35. The following rule is the Plan for Publication of Opinions of the Seventh Circuit promulgated pursuant to resolution of the Judicial Conference of the United States:

(a) Policy. It is the policy of this circuit to reduce the proliferation of published opinions.

(b) Publication. The court may dispose of an appeal by an order or by an opinion, which may be signed or per curiam. Orders shall not be published and opinions shall be published.

(1) "Published" or "publication" means:

(i) Printing the opinion as a slip opinion;

(ii) Distributing the printed slip opinion to all federal judges within the cirucit, legal publishing companies, libraries and other regular subscribers, interested United States attorneys, departments and agencies, and the news media;

(iii) Permitting publication by legal publishing companies as they see fit; and

(iv) Unlimited citation as precedent.

(2) Unpublished orders:

(i) Shall be typewritten and reproduced by copying machine;

(ii) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and the news media, and shall be available to the public on the same basis as any other pleading in the case;

(iii) Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation of prior opinion (if reported) and the judgment or operative words of the order, such as "affirmed," "enforced," "reversed," "reversed and remanded," and so forth;

(iv) Except to support a claim of *res judicata*, collateral estoppel or law of the case, shall not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose.

(c) Guidelines for Method of Disposition.

(1) Published opinions:

Shall be filed in signed or per curiam form in appeals which

(i) Establish a new or change an existing rule of law;

(ii) Involve an issue of continuing public interest;

(iii) Criticize or question existing law;

(iv) Constitute a significant and non-duplicative contribution to legal literature

(A) by a historical review of law;

(B) by describing legislative history; or

(C) by resolving or creating a conflict in the law; or

(v) Reverse a judgment or deny enforcement of an order when the lower court or agency has published an opinion supporting the order.

(2) Unpublished orders:

(i) May be filed after an oral statement of reasons has been given from the bench and may include only, or a little more than, the judgment rendered in appeals which

(A) are frivolous or

(B) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where

(aa) a controlling statute or decision determines the appeal;

(bb) issues are factual only and judgment appealed from is supported by evidence;

(cc) order appealed from is nonappealable or this court lacks jurisdiction or appellant lacks standing to sue; or

(ii) May contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which

(A) are not frivolous but

(B) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

(d) Disposition is to be by Order or Opinion.

(1) The determination to dispose of an appeal by unpublished opinion shall be made by a majority of the panel rendering the decision.

(2) The requirement of a majority represents the policy of this circuit. Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.

(3) Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for disposition of appeals as set forth in this rule.

IN THE

Supreme Court of the United States

No. 76-5325

OCTOBER TERM, 1976

BEN EARL BROWDER,

Petitioner,

vs.

DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT

WILLIAM J. SCOTT,
Attorney General, State of Illinois.
DONALD B. MACKAY,
MELBOURNE A. NOEL, JR.,
RAYMOND MCKOSKI,
Assistant Attorneys General,
188 W. Randolph St. (Suite 2200),
Chicago, Illinois 60601,
(312) 793-2570.

KEENAN PRINTING COMPANY (312) 372-0056 365

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT

QUESTIONS PRESENTED

1. Whether the probable cause standard requires that an offender's identity be positively ascertained before an arrest can be made.

2. Whether an arrest warrant is necessary to enter a private dwelling for the purpose of effecting an arrest when the arresting officers gain peaceful admittance to the dwelling with the knowledge and consent of the owner.

3. Whether petitioner's Fourth Amendment claim has been waived under the test established in *Wrainwright* v. *Sykes*, ——, U.S. ——, 45 L.W. 4807 (1977).

4. Whether petitioner's Fourth Amendment claim is cognizable under the Habeas Corpus Act in light of *Stone* v. *Powell*, 428 U.S. 465 (1976).

5. Whether respondent's notice of appeal was timely filed in the district court.

STATEMENT

On January 29, 1971, at approximately 7:30 p.m., Sharon Alexander, a fifteen year old female Negro was forced into the basement entrance of a building at 3922 West Van Buren Street, Chicago, Illinois and raped by two male Negroes (A. 130, 154). After the two assailants released her, Miss Alexander ran to her home located at 3904 West Van Buren Street and her mother called the police (A. 131). Officer James Newson responded to the call (A. 125). Miss Alexander informed Officer Newson of the circumstances surrounding the rape and described the assailants as two Negro males in their late teens, one light-complexioned and one dark-complexioned both wearing brown jackets (A. 126). After this brief conversation Officer Newson transported Miss Alexander and her mother to the Cook County Hospital (A. 126). At approximately 9:30 p.m., that same night, Investigator Stan Thomas arrived at the hospital after receiving an assignment to interview Miss Alexander (A. 129). Although Miss Alexander was visibly upset, she relaxed after a few minutes and was then able to give Investigator Thomas a full description of the attack and her attackers (A. 130). She stated that the last name of one of the assailants was "Browder" and that he lived in the 4000 block of West Monroe Street, Chicago (A. 130), and that he was approximately 17 years of age (A. 132). She also stated that she was acquainted with "Browder's" sister (A. 130). The other assailant, a light-complexioned male Negro approximately 17 years of age, was unknown to her (A. 130). She also related that after the rape "Browder", who was armed with a gun, threatened that if she told anyone he would kill her (A. 131). On January 31, 1971, Investigator Thomas conveyed the information supplied by

Miss Alexander to Youth Officer Conroy and enlisted his aid in locating the assailant named Browder (A. 132). Officer Conroy reviewed the juvenile files retained at police headquarters and discovered a file for a Tyone Browder, a 16 year old male Negro residing at 4053 West Monroe Street, Chicago (A. 139). Immediately thereafter Officer Conroy personally interviewed Miss Alexander at her home and confined the information he had received from Investigator Thomas (A. 140). After verifying through a local resident that a Browder family in fact lived at 4053 West Monroe Street, Officer Conroy telephoned Mrs. Lucille Browder, petitioner's mother (A. 141). He advised Mrs. Browder that he was a Youth Officer investigating an assault upon a girl and that the victim had stated that a teen-aged Browder was the assailant. He also indicated that he had the name Tyrone Browder on record (A. 141-142). Mrs. Browder responded that "if it was an assault on a girl it wouldn't be Tyrone, it would be Ben Earl". (A. 142).[1] After receiving an affirmative response to his inquiry of whether petitioner and Tyrone were at home, Officer Conroy asked if Mrs. Browder would keep them home so he could come and talk with them (A. 12).

Officer Conroy, together with three other officers, arrived at the Browder residence at approximately 6:00 p.m., that same day, January 31, 1971 (A. 12). At the door Officer Conroy identified himself to Mrs. Browder as the officer

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1. At the evidentiary hearing in federal district court Mrs. Browder denied making any such statement (A. 151). Both the district court and the court of appeals assumed that Mrs. Browder did in fact make the statement attributed to her but found it did not establish probable cause (A. 114, 166 n.1).

who had talked with her earlier over the telephone. Mrs. Browder invited the officers inside and introduced them to petitioner, Tyrone and two other teen-age males (A. 142). In the living room Officer Conroy stated to those present that he was investigating a rape and had information that a teenage Browder was involved. Petitioner and Tyrone denied any knowledge of the crime (A. 143). They were arrested and advised of their constitutional rights (A. 27). Then, in the words of Officer Conroy:

> I suggested to the others present, they were about the same age and height, and that if they came along it is possible that the victim wouldn't identify anyone, because there would be so many. I suggested if I brought one she would maybe point out one, and the other two fellows agreed to come along. . . .
>
> Before we left I said that 'It is possible one of you will be identified, because there is supposed to be a second guy involved, besides Browder', and I informed them of their Constitutional rights. (A. 143).

Mrs. Browder declined the officers' offer to accompany her sons to the police station (A. 41).

The four youths were taken to the police station and the arresting officers began preparation for Miss Alexander to view a lineup (A. 143-144). At the station an Officer James, not involved in the investigation of the Alexander rape, noticed that petitioner fit the description of an individual (a male Negro, seventeen years old, with a cast on his right arm) who had raped Johnnie May Johnson on January 30, 1971 (A. 157).[2] Miss Johnson was then summoned to view

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2. The rape occurred on January 30, 1971, at approximately 5:45 p.m., in the basement of a building located at 4148 W. Adams Street, Chicago, Illinois (A. 158). The assailant also took Miss Johnson's wristwatch and money at gun-point (Tr. of Proceed., Aug. 26, 1971 at 130-132). The scene of the rape and armed robbery was approximately one block from petitioner's residence (A. 53).

the lineup. A lineup was conducted at approximately 7:00 p.m., in which petitioner, his brother, the two other persons arrested at the Browder residence and one additional person participated (A. 144). All participants were male Negroes in their teens, five feet seven inches to approximately five feet eleven inches in height (A. 144). Petitioner was the only participant with a bandage or cast on his right arm (A. 20). After viewing the lineup separately, both Miss Alexander and Miss Johnson identified petitioner (A. 145). Upon being identified petitioner called Officer Conroy off to the side and started to confess to the rape of Miss Johnson (A. 56, 28). Officer Conroy interrupted him by saying "wait a minute" and advised petitioner of his constitutional rights (A. 56). Petitioner then confessed to raping Miss Johnson but denied possessing a gun at the time and also denied raping Miss Alexander (A. 28-29). Ot this point Officer Conroy summoned investigator Thomas (A. 57). Thomas readvised petitioner of his rights and petitioner again confessed (A. 44). Petitioner was charged with the rape and armed robbery of Miss Johnson and the rape of Miss Alexander (A. 158). Tyrone Browder and the other two teen-age males were released (A. 72). Petitioner was only tried on the charges stemming from the rape of Miss Johnson.

Prior to trial petitioner's court-appointed attorney filed various pre-trial motions including a motion to suppress the lineup and in-court identifications on the basis of an impermisively suggestive lineup and a motion to suppress the confession on the basis of inadequate Miranda warnings and mental coercion (A. 17-19). After an evidentiary hearing both motions were denied (A. 49-50). The issue of the legality of petitioner's arrest was not raised in the trial court. On August 27, 1971, after a jury trial, petitioner was found guilty of rape and not guilty of armed robbery (A. 101).

On direct appeal to the Illinois Appellate Court, First District, petitioner for the first time attempted to raise the issue that his arrest was unlawful (A. 9). The Appellate Court held that the unlawful arrest issue had been waived by petitioner's failure to raise it in the trial court (A. 9). Petitioner's petition for leave to appeal to the Illinois Supreme Court was denied. 54 Ill. 2d 597 (1973).

Subsequently petitioner filed a petition pursuant to the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat., Ch. 38, sec. 122-1 et seq. The petition was dismissed by the trial court and the dismissal was upheld on appeal (A. 108).

A petition for a writ of habeas corpus was filed in the United States District Court for the Northern District of Illinois on January 8, 1975. On February 11, 1975, respondent filed a motion to dismiss the petition. Because petitioner's appeal from the denial of his post-conviction petition was still pending in the Illinois Appellate Court, habeas proceedings were stayed by the district court on March 7, 1975 (A. 1). On October 21, 1975, the district court entered an order both denying the motion to dismiss and granting the writ (A. 110-117). The order also recited, "Respondent given sixty days to retry the petitioner or the Writ of H.C. shall be executed" (A. 110). The issuance of the writ was based upon the fact that the state trial record, the only evidence then before the court, did not establish probable cause for petitioner's arrest (A. 114). On November 18, 1975, respondent filed a motion to further stay execution of the writ and to conduct an evidentiary hearing on the merits of the petition (A. 118). The motion was based upon the fact that the district court's issuance of the writ on the sole basis of the state court record was erroneous since the probable cause issue had never been litigated in state court and therefore the paucity of evidence in the

record relating to the probable cause issue, understandable (A. 119). Respondent's motion was granted (A. 120), and an evidentiary hearing was held on January 7, 1976 (A. 121). The hearing provided the first opportunity for a judicial assessment of the sufficiency of the facts supporting petitioner's arrest. Nineteen days after the hearing the district court denied respondent's motion stating "following an evidentiary hearing and further argument by the parties the court finds that the writ of habeas corpus was properly issued on October 21, 1975" (A. 161). No findings of fact were made. Execution of the writ was stayed for five days pending filing of notice of appeal (A. 161). Respondent filed a notice of appeal on January 27, 1976 (A. 162). On April 28, 1976, the Seventh Circuit Court of Appeals reversed the order granting the writ holding that the facts developed at the evidentiary hearing established probable cause for petitioner's arrest (A. 164).

SUMMARY OF ARGUMENT

I.

An arrest is valid under the Fourth Amendment if it is supported by probable cause and effected in a reasonable manner.

At the time of petitioner's arrest the arresting officers knew that Miss Alexander's assailant was a dark-complexioned male Negro, approximately seventeen years of age, with the last name of "Browder", who lived in the 4000 block of West Monroe Street, Chicago, Illinois. These facts supplied the officers with reasonable grounds to believe that petitioner was the rapist. The fact that upon entering petitioner's residence the officers were confronted with another individual, petitioner's brother Tyrone, who also fit the description in every respect, did not negate the existence of probable cause for petitioner's arrest. Neither does the arrest of petitioner's brother weaken the basis for petitioner's arrest. In judging the legality of the arrest of more than one suspect the "substantiality of the basis for each arrest should be considered independently". ALI, *A Model Code of Pre-Arraignment Procedure* 134-135 (1975). The arrests for which sufficient basis exist are proper; those for which a sufficient basis does not exist are improper. Any rule which automatically requires a finding of no probable cause when more than one suspect is arrested does an injustice to the Fourth Amendment since it unduly restricts the "leeway" due law enforcement officials in protecting the community and does nothing to further the individual's right to be free from an arrest not supported by sufficient facts.

The common law rule, still followed in the vast majority of jurisdictions, was that a warrantless arrest entry into a private dwelling was permissible if there existed probable cause to believe the person sought had committed a felony, was within the dwelling and the method of entry was reasonable. This rule is far superior to any suggested alternative and should be adhered to today. However, regardless of what the general rule governing warrantless arrest entries should be, it is clear that no warrant was necessary in this case because petitioner's mother voluntarily admitted the officers into her home. After telephoning Mrs. Browder, to advise her that they were coming, the officers arrived at the residence and were "invited" in by Mrs. Browder. Mrs. Browder's consent vitiated any need for a warrant. Even if consent was lacking, a warrant was not required since the entry was at a reasonable hour, peacefully accomplished and at least acknowledged by the owner. Additionally, probable cause existed to believe that petitioner committed a rape and was within the premises and no search of the premises was conducted.

II.

Petitioner cannot present his claimed Fourth Amendment violation by way of federal habeas corpus because he has waived the issue under *Wainwright* v. *Sykes*, —— U.S. ——, 45 L.W. 4807 (1977) and the issue itself is not cognizable in habeas proceedings in light of *Stone* v. *Powell*, 428 U.S. 465 (1976).

Illinois law requires that Fourth Amendment claims be raised in the trial court. Failure to do so constitutes a waiver of the claim. Petitioner has not established sufficient "cause" for his failure to raise his claim in the trial court. Indeed, whatever the precise scope of the cause requirement it is not met where, as here, petitioner's state trial

counsel did object to the admission of the evidence challenged in the habeas petition but on grounds other than petitioner suggests, knew of the facts forming the basis for the objection raised in the habeas petition and actually used those facts in the defense, and is not alleged to be incompetent. Neither has petitioner established that he was "prejudiced" by the alleged constitutional violation. Failure to exclude unlawfully obtained evidence cannot prejudice an individual defendant since the exclusionary rule is not intended to benefit him but to benefit society as a whole in its attempt to deter unlawful police conduct. In any event petitioner was not prejudiced because the challenged evidence was reliable in nature and therefore did not effect adversley the fairness of the proceedings.

The Illinois procedures permitting an attack on allegedly unconstitutionally seized evidence also provided petitioner with an "opportunity for full and fair litigation" of his Fourth Amendment claim in state court. The Illinois procedures insure that evidence illegally obtained will not be used at trial against a defendant thereby deterring future illegal searches and seizures by police. Thus, the purpose behind the requirement of an opportunity to litigate the issue in state court is served by Illinois procedures and petitioner is barred from raising his claim in a habeas action. Notwithstanding petitioner's assertion, the nature of the challenged evidence has no bearing on the analysis since petitioner does not contend that the manner in which the evidence was obtained affected its reliability.

III.

A final, appealable order was not entered by the district court until it had complied with all the requirements of the Habeas Corpus Act. One such requirement is that the district court decide on the basis of the petition and return

if an evidentiary hearing is required. The order of October 21, 1975, granting the habeas petition includes no finding that a hearing was not required, and any such finding would have been erroneous. As of October 21, 1975, the only documents before the court were the petition and supporting memorandum, a motion to dismiss and supporting memorandum and the state court record. The state court record disclosed that the illegal arrest issue had never been raised in the state trial court. Nevertheless, the district court granted the writ without an evidentiary hearing on the basis that the state court record did not establish probable cause. Twenty-eight days after the ruling, respondent filed and the court allowed a motion for an evidentiary hearing under the Habeas Corpus Act. Only after the district judge had conducted the evidentiary hearing were all the steps required by the Act completed and only then could a final order be issued. Accordingly, the final order in this case was the district court's order of January 26, 1976 reaffirming the order of October 21, 1975. Even if the October 21, 1975 order was a final order, *United States* v. *Dieter*, —— U.S. ——, 97 S. Ct. 18 (1976) requires that the time within which to appeal run from the January 26, 1976 order.

ARGUMENT

I.

THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION WAS NOT VIOLATED BY THE WARRANTLESS ARREST OF PETITIONER SINCE THE ARREST WAS BASED ON PROBABLE CAUSE AND EFFECTED IN A REASONABLE MANNER.

A.

Probable Cause Existed For Petitioner's Arrest Since The Arresting Officers Knew That Either Petitioner Or His Similar Looking Brother Was One Of Miss Alexander's Assailants. The Probable Cause Standard Does Not Require That An Offender's Identity Be Positively Ascertained Before An Arrest Can Be Made.

The police officers who arrested petitioner on the evening of January 31, 1971, possessed the following information concerning the identity of one of the two assailants of Sharon Alexander:

1. He was a dark-complexioned male Negro (A. 26) in his late teens, approximately seventeen years of age (A. 132);

2. His last name was Browder and he lived in the 4000 block of West Monroe Street, Chicago, Illinois; and

3. Tyrone Browder, a dark-complexioned male Negro (A. 153) sixteen years of age (A. 139) and Ben Earl Browder, a dark-complexioned male Negro approximately seventeen or eighteen years of age (A. 142), resided at 4053 West Monroe Street, Chicago, Illinois (A. 139, 141, 142).

Petitioner does not contest the fact that the arresting officers possessed this information but contends that the information was insufficient to establish probable cause for his arrest. Petitioner reasons that the probable cause standard required a description of sufficient detail to rule out any possible suspect other than petitioner. Since the police were unable to definitely determine which of the two Browders actually committed the rape prior to arrest, petitioner concludes that neither could be arrested. Respondent submits that the Fourth Amendment does not require that the focus narrow to just one person in order for probable cause to exist.

As the term probable cause implies, "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment". *Hill* v. *California,* 401 U.S. 797, 1111 (1971). More than bare suspicion but less than evidence that would justify conviction is required. *Brinegar* v. *United States,* 338 U.S. 160 (1949). The flexibility of the standard is necessitated by the dual purpose it serves. On one hand the arresting officer must possess sufficient facts establishing a reasonable belief of guilt in order to protect citizens from arrest based on no more than whim or caprice. On the other hand facts demonstrating certainty of guilt are not required in order to give fair leeway in protecting the community in the often ambiguous situations confronting law enforcement officers. *Brinegar* v. *United States, supra,* at 176.

In light of the nature and purpose of the probable cause standard the same test should be used in determining when probable cause exists for an arrest whether a single person or several persons are arrested. The test is simply whether a police officer could reasonably believe the person or persons arrested guilty of a crime based on all the facts and

circumstances within his knowledge. *Brinegar* v. *United States, supra,* at 175. In judging the legality of the arrest of more than one suspect the "substantiality of the basis for each arrest should be considered independently". American Law Institute, *A Model Code of Pre-Arraignment Procedure* 134-135 (1975). The arrests for which sufficient basis exist are proper. Id.[3] To establish a per se rule that when more than one person is arrested all arrests lack probable cause is not required by the Fourth Amendment and in fact does an injustice to it. As long as there is a sufficient factual basis to support a particular arrest, whether or not a single person or a group of persons is arrested, the arrested individual's rights under the Fourth Amendment are not violated. However, if reasonable grounds exist for the arrest of more than one person and police are precluded from effecting the arrests merely because they are not in a position to definitely know which arrestee will eventually be identified as the perpetrator, the salutory purpose of the Fourth Amendment in providing sufficient leeway in ambiguous situations for the communities protection is nullified. The instant case provides the perfect illustration.

The arresting officers had a highly specific description of one of Miss Alexander's assailants including last name, address, approximate age and general physical appearance.

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3. Professor Perkins concurs in this analysis. See, Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 238 (1940). The Restatement of Torts illustrates the Rule thusly:

> A sees B and C bending over a dead man D. B and C each accuse the other of murdering D. A is not sure that either B or C did the killing, but he has a reasonable suspicion that either B or C killed D. A is privileged to arrest either or both. Restatement of Torts (Second), Section 119, illustration 2 (1965).

When the officers arrived at the Browder home to effect the arrest, they were confronted with petitioner and his brother, Tyrone, each fitting the assailant's description in every particular.[4] At this point the officers possessed sufficient facts upon which to draw the reasonable conclusion that one or the other or possibly both raped Miss Alexander. The officers adopted the only reasonable course of action in arresting both. The alternatives were unreasonable. To arrest neither Browder would not only create the likelihood of flight but would also give the true assailant the opportunity to make good on his threat to Miss Alexander's life. To arrest only petitioner or his brother would be to gamble with these possibilities. Petitioner's rights under the Fourth Amendment were not violated since an independent examination of his arrest discloses a sufficient factual basis. See, *Code of Pre-Arraignment Procedure, supra,* at 135.

Miss Alexander was able to proivde such a detailed description of petitioner because she attended school with petitioner's sister (A. 140). In most cases the police are not so fortunate. The description which a victim supplies of an assailant will very rarely justify an officer in believing that a person who appears to meet the description

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4. Petitioner and his brother, Tyrone, each had the same last name and lived at the same address. Both were dark-complexioned male Negroes. Petitioner was seventeen years of age (A. 84), Tyrone was sixteen years of age (A. 139). The record contains no specifics as to height or weight at the time of the crime. However, there is some indication that the height differential was minimal since at the time of the evidentiary hearing in district court Tyrone was 6′ 1″ in height and petitioner was 6′ 2″ in height (A. 153).

is definitely, or even most likely, the true offender. In the normal case a victim's description could literally fit hundreds of people. See, e.g., *Chambers* v. *Maroney,* 399 U.S. 42 (1970). Petitioner's contention notwithstanding, the police are justified in effecting arrests in these cases if the arrest is reasonably supported, not conclusively supported, by the description. See, *Chambers* v. *Maroney, supra.* Even in the rare case where police are supplied with the name and address of the offender there is no assurance that the person arrested pursuant to such information is actually the offender sought. See, *Hill* v. *California,* 401 U.S. 797 (1971). Indeed the question of identity is frequently the subject of many hours and even days of jury deliberation.

Petitioner's attempt to analogize the present factual situation with that found in *Davis* v. *Mississippi,* 394 U.S. 721 (1969), is thwarted by the controlling fact that in *Davis* police did not have sufficient facts to support any arrest, whereas petitioner's arrest was supported by facts sufficient to establish probable cause.[5] See, *Cupp* v. *Murphy,* 412 U.S. 291 (1973). Neither does the fact that two other teenage males were arrested together with petitioner and his brother serve to bring this case within the proscription of *Davis*, since those arrests in no way negate the probable cause for petitioner's arrest. Whatever remedies the two teenagers might have, assuming their unlawful arrest, none inure to the benefit of petitioner. Cf. *Alderman* v. *United States,* 394 U.S. 165, 171-72 (1969). *Mallory* v. *United States,* 354 U.S. 449 (1957), also cited by petitioner in-

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5. In *Davis,* the police fingerprinted twenty-four Negro youths and interrogated another forty or fifty Negro youths on no basis other than the assailant was a "Negro youth". 394 U.S. 722.

volved the federal requirement of a prompt arraignment. *Mallory* does not hold or even imply that the focus must narrow to a single person before an arrest can be made.

B.

An Arrest Warrant Was Unnecessary Since The Arresting Officers Gained Peaceful Admittance To Petitioner's Dwelling With The Knowledge And Consent Of Petitioner's Mother.

The lawfulness of arrests for state offenses by state officers is to be determined by state law insofar as it is not violative of the Federal Constitution. *Ker* v. *California*, 374 U.S. 23, 37 (1963). By statute in Illinois, a peace officer with or without a warrant is authorized to arrest any person he has grounds to believe committed an offense at any time of the day or night anywhere in the jurisdiction of the state. Ill. Rev. Stat., Ch. 38, secs. 107-2, 107-5. The Illinois Supreme Court has held that a warrantless arrest entry onto the premises of the person sought is lawful even in the absence of hot pursuit, exigent circumstances or consent. *People* v. *Johnson*, 45 Ill. 2d 283, 259 N.E. 2d 57 (1970). However, before making a forcible entry an officer must be refused admittance after he has announced his authority and purpose. *People* v. *Barbee*, 35 Ill. 2d 407, 220 N.E. 2d 401 (1966). Clearly, the method used in effecting petitioner's arrest falls within the bounds of Illinois statutory and case law. The remaining question, whether the arrest procedures violated the Fourth Amendment of the Federal Constitution, is addressed below.

The common law antecedents of the Fourth Amendment supply the appropriate starting point for an inquiry into the warrant requirements of the Amendment. *Gerstein* v. *Pugh*, 420 U.S. 103 (1975).

At common law a peace officer was authorized to arrest without a warrant for a misdemeanor committed in his presence and for a felony, whether or not committed in his presence, if reasonable grounds existed for the arrest. *United States* v. *Watson*, 423 U.S. 411 (1976). This common law authority included the right to enter a private dwelling in order to effect an arrest. 2 Hale, *Pleas of the Crown* 90-92 (1st Am. Ed., 1847); 4 Blackstone's *Commentaries* 292; Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 798, 802-806 (1924); *Wharton's Crim. Proc.*, sec. 82 (12th Ed. 1972); *Commonwealth* v. *Phelps*, 209 Mass. 396, 95 N.E. 868, 873 (1911); *Stanley* v. *Wells*, 71 Ill. 78 (1873); *United States* v. *Dean*, 50 F. 2d 905 (D.C. Mass. 1931). An arresting officer armed with probable cause could freely enter the premises of the person sought to be arrested as long as the entry was peacefully accomplished and no force or "breaking" was required. "Breaking" did not include entry through an open door, *Smith* v. *Tate*, 143 Tenn. 268, (1921), admittance by a third person, *Read* v. *Case*, 4 Conn. 166 (1822), *Argetakis* v. *State*, 24 Ariz. 599 (1923), or admittance by the arrestee even if deception or ruse was employed to gain entrance, *Rex* v. *Backhouse*, 98 Eng Rep. 533 (1763), *Wilgus* at 806. The "breaking" of doors and windows to gain entry was authorized if the officer was refused quiet admittance after announcing his purpose and demanding admission. 4 Blackstone's *Commentaries* 292; 2 Hale, *Pleas of the Crown* 90-92 (1st Am. Ed., 1847); Wilgus at 803; *Commonwealth* v. *Phelps*, 209 Mass. 396, 95 N.E. 868, 873 (1911); Bankin, *Criminal Trial Procedure in the General Court of Colonial Virginia*, pp. 74-75; *Smith* v. *Tate*, 143 Tenn. 268, 227 S.W. 1026 (1921); *Argetakis* v. *State*,

212 P. 372 (1923).[6] Even announcement and demand were not required in all situations, such as where the peril would have been increased or the purpose and identity of the officer was already known. Wiglus at p. 802; *People* v. *Maddox*, 46 Cal. 2d 301, 306, 294 P. 2d 6, 9 (1956) cited in *Ker* v. *California*, 374 U.S. 23, 40 (1963).

These rules regulating warrantless arrests were accepted practice in both England and the United States at the time the Fourth Amendment was adopted. There is nothing in the wording of the Fourth Amendment or in the circumstances surrounding its adoption that indicates that the framers wished to alter the practice of warrantless entries for arrest. Indeed, the practice which the framers did intend to alter was the practice of issuing general warrants and writs as assistance. *Stanford* v. *Texas*, 379 U.S. 476, 481-485 (1965); Lasson, *History and Development of the Fourth Amendment of the United States Constitution*, Ch. II (1937).

In interpreting and applying the provisions of the Fourth Amendment this Court "has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant". *Gerstein* v. *Pugh*, 420 U.S. 103, 113 (1975). Although the Court has not squarely answered the question of whether a warrant is necessary

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6. A few early commentators took the position that, in the absence of fresh pursuit a warrant should be obtained before breaking doors. 2 Hawkins, Pleas of the Crown, Ch. 14, sec. 7 (1787); Coke, Fourth Institute of the Laws of England 177 (1797). However, even these writers did not challenge the rule that a warrantless entry could be made if peaceable.

to enter private premises in order to effect an arrest, several decisions seem to acknowledge the validity of the common law rule permitting warrantless entries.

In *Johnson* v. *United States*, 333 U.S. 10 (1948), this Court held that a warrantless entry into a hotel room for the purpose of arresting the occupant was unlawful not due to the lack of a warrant but because the officers did not know the identity of the occupant. The Court stated in dictum that the warrantless entry would have been proper if the officers had reasonable cause to believe that a particular person located therein was guilty of a felony. 333 U.S. at 15. *Ker* v. *California*, 374 U.S. 23 (1963) upheld a warrantless entry into an apartment for the purpose of making an arrest after proper notice of authority and purpose had been given by the officers. The dissenting Justices questioned the adequacy of the notice but did not question the rule permitting warrantless entries, or forcible warrantless entries after proper notice. Likewise, in *Sabbath* v. *United States*, 391 U.S. 585 (1968), the Court proceeded on the assumption that a warrantless entry based on probable cause is reasonable if no "breaking" is involved or if "breaking" is involved the entry is still reasonable if preceded by proper announcement and demand. The opening of a closed door was held a "breaking" under 18 U.S.C. 3109 and since it was not accompanied by any announcement the entry was unlawful. As in *Miller* v. *United States*, 357 U.S. 301 (1958), the common law basis for 18 U.S.C. 3109 was noted. 391 U.S. at 589.[7]

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7. This is not to say that doubts have not been expressed by members of this Court from time to time. See, Coolidge v. New Hampshire, 403 U.S. 443, 476-481 (1971); United States v. Watson, 423 U.S. 411, 96 S. Ct. 820, 839 n. 12 (1976).

The common law rule authorizing warrantless entries went virtually unchallenged until 1970. In that year the Court of Appeals for the District of Columbia in *Dorman* v. *United States*, 435 F. 2d 385 (D.C. Cir. 1970, en banc), held that absent "exigent circumstances" or "urgent need" a warrant is required before an arrest entry onto private premises can be made. 435 F. 2d at 392. The *Dorman* rule has been followed in the Fourth, Sixth, Eighth and Ninth Circuits. See, *Vance* v. *North Carolina*, 432 F. 2d 984 (4th Cir. 1970); *United States* v. *Shye*, 492 F. 2d 886 (6th Cir. 1971); *Salvador* v. *United States*, 505 F. 2d 1348 (8th Cir. 1974); *United States* v. *Phillips*, 497 F. 2d 1131 (9th Cir. 1974). The Second, Fifth and Seventh Circuits have refused to alter the common law rule. See, *United States* v. *Rollins*, 522 F. 2d 160, 167 (2nd Cir. 1975); *United States* v. *Wysocki*, 457 F. 2d 1155, 1159 (5th Cir. (1972); *United States ex rel. Wright* v. *Woods*, 432 F. 2d 1143 (7th Cir. 1970). The state courts are also split on the issue, with the majority permitting both peaceful and forceful warrantless entries.[8]

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8. State courts following the common law rule include: State v. Perez, 277 So. 2d 778 (Fla. 1973); State v. Pontier, 518 P. 2d 969, 974 (Id. 1974); People v. Johnson, 259 N.E. 2d 57 (Ill. 1970); Wanzer v. State, 97 A. 2d 914 (Ct. App. Md. 1953); People v. Eddington, 178 N.W. 2d 686, 691 (Ct. App. Mich. 1970); State v. Howard, 162 S.E. 2d 495, 505 (N.C. 1968); State v. Handy, 242 A. 2d 888 (N.J. 1968); People v. Santiago, 384 N.Y.S. 2d 361 (Sup. Ct. Bronx Co. 1976); White v. State, 356 S.W. 2d 411 (Tenn. 1962); John v. State, 249 N.W. 2d 593 (Wis. 1977). State courts which adhere to the Dorman rule include: People v. Ramsey, 545 P. 2d 1333 (Cal. 1976); Comm. v. Ford, 329 N.E. 2d 717 (Mass. 1975). Other courts have avoided the issue by assuming arguendo the need for exigent circumstances and finding them in the particular case. See, State v. Johnson, 232 N.W. 2d 477 (Ia. 1975); State v. Lasley, 236 N.W. 2d 604 (Minn. 1975); State v. Girard, 555 P. 2d 445 (Ore. 1976).

Those cases holding that a warrantless entry is per se unreasonable rely on the rationale that the protection afforded persons in their homes against warrantless searches and seizures of inanimate objects is no less applicable when the individual himself is seized. See, e.g., *Dorman* v. *United States*, 435 F. 2d 385, 390 (D.C. Cir. 1970). However this analysis ignores the fundamental difference between a search warrant and an arrest warrant.

An arrest warrant is issued upon a showing that there are reasonable grounds to believe that a person has committed an offense regardless of the present location of the person sought. *Jones* v. *United States*, 362 U.S. 257 (1960). A search warrant is issued when it is demonstrated that certain objects are connected with a crime and are presently located in a particular place. The distinction between the two types of warrants is necessitated by the nature of the things sought. A person who has committed a crime possesses both the desire and ability to change his location freely. An inanimate object is capable of no such desire and has no such ability. It remains stationary until acted upon by some outside force. The mobility factor is not reduced by the fact that at a particular point in time the police have reason to believe that an offender can be located at a particular place. Further, the protection conferred by a search warrant against wholesale rummaging through a private dwelling and personal effects is generally unnecessary in the case of an arrest entry. If the suspect does not come to the door in response to an officer's knock, and entry into

the premises is thereby required, the scope of the search will be far less intrusive than a search for weapons, narcotics, etc.

The adoption of a rule providing that arrest entries are per se unreasonable unless exigent circumstances exist would place a burden on arresting officers never intended by the Fourth Amendment. The *Dorman* Court lists seven factors to be considered when determining if exigent circumstances are present. 435 F. 2d at 392-393. Even assuming that these factors include all pertinent considerations the police are put in the position of conducting a "mini pre-arrest hearing" to determine whether warrantless entry is permissible. Are some factors more important than others? What if some factors indicate warrantless entry is proper and other militate against such entry? Exactly which factors are present? The arresting officer must guess and then act at his peril. The fast developing and often ambiguous situations confronting police officers do not allow law enforcement officials the luxury of looking over their list of factors, balancing them and then arriving at a sterile, hopefully correct decision. If the decision is to arrest without a warrant then the existence or non-existence of these same factors will be litigated again, this time in court on defense counsel's motion. Cf. *United States* v. *Watson*, 423 U.S. 411, 96 S. Ct. 820, 828 (1976). Also, Mr. Justice Powell's observation in his concurring opinion in *Watson* that requiring a warrant would interfere with the proper timing of arrests is applicable in private as well as public arrest situations. 96 S. Ct. at 831-832.

If a hard and fast rule is to be adopted concerning warrantless entries, the approach taken by the American Law Institute is superior to that suggested in *Dorman*. *A Model Code of Pre-Arraignment Procedure*, sec. 120.6(1) (1975),

establishes a presumptive need for a warrant for nightime arrests unless the arresting officer reasonably believes that a prompt arrest is necessary to prevent harm to bystanders, destruction of evidence or escape. Otherwise the common law rule permitting warrantless entries is followed since, "to go further and require a warrant or a showing of necessity before police may make a felony arrest on private property even in the daytime seems unduly restrictive". Id. at 146.

It is submitted, however, that the best approach is that taken by the common law, a majority of the jurisdictions in the United States, and by the Fourth Amendment itself namely, a warrantless entry into a private dwelling to effect an arrest is valid if there is probable cause to believe the person sought is within the dwelling and has committed a felony and the method of entry and arrest are reasonable. See, *United States* v. *Santana*, —— U.S. ——, 96 S. Ct. 2406 (1976) (White J., concurring). An individual's right to privacy would be protected by the requirements of probable cause, reasonableness, the rule that persons arrested without a warrant be taken before a judge for a probable cause hearing without unnecessary delay (see, e.g., Ill. Rev. Stat., Ch. 38, sec. 109-1), and by strategic incentives for police to obtain warrants where possible.[9] The community's right to

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9. One incentive is the tendency of courts to find probable cause more readily in close cases when a judge makes the initial finding. Also, in jurisdictions which prohibit defendant's going beyond the four corners of the arrest affidavit to challenge the facts asserted therein (see, People v. Bak, 45 Ill. 2d 140, 258 N.E. 2d 341 (1970)) the defendant will not be able to secure an evidentiary hearing to determine whether there was probable cause if the affidavit is

effective law enforcement is safeguarded by freeing police from the uncertainty of a complex balancing procedure and freeing the judiciary from endless litigation centering around new warrant requirements. See, *United States* v. *Watson*, 423 U.S. 411, 96 S. Ct. at 831-832 (Powell, J., concurring).

A general rule permitting reasonable warrantless entries based upon probable cause is however not necessary to uphold the instant warrantless arrest. One of the arresting officers, prior to proceeding to petitioner's residence, telephoned Lucille Browder, petitioner's mother. He identified himself stating that he was a "Youth Officer investigating an assault, and the girl said it was a teen-aged boy by the name of Browder and I [have] the name Tyrone on the record". The mother responded "if it was an assault on a girl it wouldn't be Tyrone it would be Ben Earl" (A. 141-142). At this point in the conversation the arresting officer asked if either of the boys were home. Mrs. Browder responded they were both present. The arresting officer then asked if she would keep them at home so he could come and talk to them (A. 141-142). Immediately thereafter, the arresting officers went to the Browder residence, met Mrs. Browder at the door, and identified themselves. Mrs. Browder "invited" the officers into the house stating that Tyrone and petitioner and two other teen-aged boys were on the premises (A. 142). Mrs. Browder's consent to the entry, vitiated any need for a warrant, assuming a warrant is constitutionally required. Cf. *Schneckloth* v. *Bustamonte*,

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sufficient on it's face. As a result he will be deprived of an opportunity for discovery, creating impeachment material and litigating a credibility issue prior to trial if a warrant is obtained.

412 U.S. 235 (1973). The voluntary nature of the consent is implicit from the totality of the circumstances. No force, threat or even trickery[10] was used to gain entrance. Indeed the request for entry was made under the least intimidating circumstances—over the telephone. Mrs. Browder gave no indication whatsoever that she was opposed to the police coming to her home. In fact she attempted to assist the police in their mission by advising them that it was more likely petitioner than Tyrone that they wanted. During the time it took the officers to proceed from the station to the residence, Mrs. Browder had time to consider whether or not she wanted to allow the police in her home and to consult with other family members. See, *Bowles* v. *United States*, 439 F. 2d 536 (D.C. Cir. 1970) ("Mrs. Burwell's awareness that police would probably arrive at her home at date and time she had focused is really a greater protection than that she would have obtained from the usual Magistrate's ex parte warrant".) Upon their arrival at 6:00 p.m., Mrs. Browder "invited" the police inside her home giving no indication that the decision was other than an exercise of her free will. Since there was "nothing constitutionally suspect in the subjective forces that impelled [Mrs. Browder] to cooperate with the police", *Coolidge* v. *New Hampshire*, 403 U.S. 443, 488 (1971), the consent was

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10. Even entry by trickery or deceit without a warrant has been upheld by virtually all courts considering the question. See, United States v. Beale, 445 F. 2d 977 (5th Cir. 1971); United States v. Syler, 430 F. 2d 68 (7th Cir. 1970); Leahy v. United States, 272 F. 2d 487 (9th Cir. 1959); Grzesiowski v. State, 343 N.E. 2d 305 (Ct. App. Ind., 1976); Mullaney v. Maryland, 246 A. 2d 291 (Ct. Sp. App. 1968). Also see, Sabbath v. United States, 391 U.S. 585, 590 n. 7 (1968).

voluntary. Also see, *Bowles* v. *United States,* 439 F. 2d 536 (D.C. Cir. 1970); *People* v. *Simmons,* 49 Mich. 80, 211 N.W. 2d 247 (Ct. App. Mich. 1973); *People* v. *Lara,* 117 Cal. Rptr. 549, 528 P. 2d 365 (S. Ct. Cal. 1974).

Even without consent, a warrant should not be required in cases where, as here, probable cause exists to believe the defendant is in the premises and has committed a felony; the entry is made at a reasonable hour, 6:00 p.m., and is not only peaceable but at least acknowledged by the owner of the premises; the entry is made solely to arrest and not to search; and the person sought is accused of a violent crime and has threatened his victim's life.

Finally, even if this Court were to adopt the *Dorman* rule, the instant arrest was proper in light of the exigent circumstances necessitating it. First, a grave offense of violence was involved. Second, petitioner was reasonably believed to be armed, since he was armed with a handgun when he committed the rape. Third, the information possessed by the police including petitioner's last name and address, was obtained from a "reasonably trustworthy" source, the victim. Fourth, there was strong reason to believe that petitioner was on the premises being entered because his mother said so. Fifth, the entry was made peaceably, if not consented to. Sixth, the entry was made at 6:00 p.m., not an unreasonable hour. Lastly, the police could reasonably believe that petitioner would try to escape or at least avoid apprehension. Balancing these factors outlined in *Dorman* the only reasonable conclusion is that exigent circumstances required a warrantless arrest.

In summary, the Fourth Amendment does not mandate a rule providing that all warrantless entries into private dwellings for the purpose of arrest are per se invalid. As long as probable cause exists and the mode of arrest is reasonable as in the instant case Fourth Amendment dictates have been met. Assuming a per se rule is constitutionally required a warrant was not necessary in the instant case due to the consensual entry or alternatively the exigent circumstances.

II.

PETITIONER'S CLAIM THAT CERTAIN EVIDENCE INTRODUCED AT HIS STATE TRIAL WAS THE "FRUIT" OF AN UNLAWFUL ARREST IS NOT COGNIZABLE UNDER THE HABEAS CORPUS ACT.

A.

Petitioner's Claim Has Been Waived By His Failure To Raise The Issue At Trial As Required By Illinois Law And By His Failure To Demonstrate "Cause" For The Noncompliance With State Procedures And "Actual Prejudice" Resulting From The Alleged Constitutional Violation.

Illinois law requires that a motion to suppress a confession or a motion to suppress evidence illegally seized "shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion". Ill. Rev. Stat. (1971), Ch. 38, secs. 114-11(g), 114-12(c). The motion may be made during trial if the court finds that the motion is not untimely. Id.[11] Failure to challenge a confession or other evidence in the trial court pursuant to these provisions constitutes a waiver of the issue. *People* v. *Jones,* 31 Ill.

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11. These procedural rules are virtually identical to the "contemporaneous" objection rule at issue in *Wainwright* v. *Sykes,* ——U.S.——, 45 L.W. 4807, 4809, n. 5.

2d 42, 198 N.E. 2d 821 (1964); *People* v. *Ikerd,* 26 Ill. 2d 573, 188 N.E. 2d 12 (1963). This rule applies specifically to a claim that evidence constituted fruit of an unlawful arrest. *People* v. *Nilson,* 44 Ill. 2d 244, 255 N.E. 2d 432 (1970); *People* v. *Sockwell,* 7 Ill. App. 3d 520, 288 N.E. 2d 33 (1972).

In the trial court petitioner filed a motion to suppress his confession alleging that he was not given the *Miranda* warnings and that the confession was a product of mental coercion (A. 17). Petitioner also moved to suppress identification testimony on the ground that the lineup procedure was unnecessarily suggestive (A. 48-49). A hearing was held on each motion and both were denied (A. 49-50). Petitioner never raised the contention in the trial court that the confession and identification testimony were the fruits of an unlawful arrest. On direct appeal the legality of the arrest was raised but the appellate court refused to consider the question, relying on the settled principle in Illinois law that failure to raise the issue in the trial court constituted a waiver. (A. 7-15). Petitioner also filed a petition pursuant to the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat., Ch. 38, sec. 122-1 et seq., alleging that his arrest was unlawful. The dismissal of the petition by the trial court was upheld on appeal, the appellate court concluding that it was bound by the finding of waiver on direct appeal (A. 106-109).

The Illinois Courts refused to consider petitioner's claim that the fruits of an unlawful arrest were unconstitutionally used against him at trial because petitioner failed to raise the issue in a manner prescribed by Illinois' procedural rules. This independent and adequate state procedural ground prevents consideration of the merits of the claim here absent a showing by petitioner

of cause for the noncompliance and a showing of actual prejudice resulting from the alleged constitutional violation. *Wainwright* v. *Sykes,* ——U.S.——, 45 L.W. 4807 (1977).

In the district court petitioner did not offer any explanation for his failure to object to the evidence on the basis of an unlawful arrest. He did, however, contend that there could be no waiver for federal habeas purposes because there was no deliberate tactical decision to forego the claim in state court. The district court relying upon *Fay* v. *Noia,* 383 U.S. 391 (1963) and *Allum* v. *Twomey,* 484 F. 2d 740 (7th Cir. 1973), concurred in petitioner's analysis, stating:

> Rather waiver of a constitutional claim requires objective evidence that the omission was the result of an intelligent and deliberate relinquishment as part of counsel's trial strategy, and not inadvertent or negligent mistake. [citations omitted] (A. 113).
>
> . . . [F]rom the nature of the evidence introduced at petitioner's trial no reasonable tactical basis is apparent to justify the failure to object. (A. 113)

Petitioner's analysis accepted by the district court does not establish "cause" as that term was used by this Court in *Wainwright* v. *Sykes, supra.* First, it erroneously places the burden of showing a deliberate relinquishment as part of trial strategy on the State. To the contrary it is petitioner's burden to show "cause" however that term is defined for the failure to raise the issue. Petitioner does not meet or attempt to meet that burden but relies on the State's alleged inability to demonstrate a tactical basis for the omission. Second, the district court's analysis is faulty in that it holds that the nature of the challenged evidence precluded any reasonable basis for failing to

object. This ignores the fact that petitioner's trial counsel *did* object to the identification testimony and the confession. He chose to object on the grounds of an impermissively suggestive line-up and inadequate *Miranda* warnings rather than on the grounds of an illegal arrest. However, the decision concerning which legal grounds to assert on a motion to suppress is peculiarly within the domain of trial counsel and is in effect a decision in tactics. It would be difficult to question trial counsel's decision not to challenge the arrest in light of the status of the law in Illinois at the time.[12]

Moreover, whatever the reason for trial counsel's decision not to raise the issue, it was not due to the lack of knowledge of the "contemporaneous objection rule" or a lack of knowledge of the facts underlying the petitioner's arrest. Counsel filed two motions to suppress pursuant to the Illinois statutes providing that such motions must be filed in the trial court. His knowledge of the underlying facts is demonstrated by reviewing the record and is acknowledged by petitioner. See Petitioner's Brief at 45. Trial counsel repeatedly brought out through the State's witnesses at trial that four persons were arrested without

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12. Under applicable Illinois law a confession obtained as a result of an unlawful arrest was admissible at trial if voluntary. See, *People* v. *Miller,* 13 Ill. 2d 84, 148 N.E. 2d 455 (1958); *People* v. *Hudson,* 38 Ill. 2d 616, 233 N.E. 2d 403 (1968). The voluntary nature of the instant confession is beyond question. See, p. 36 herein. Also relevant is the Illinois Appellate Court's observation concerning petitioner's claim: "We also doubt seriously that his identification in the lineup, his oral confessions after that identification and his positive in-court identification can be considered as the 'fruits' of that arrest" (A. 11).

a warrant for "investigation of rape" in an attempt to convince the jury that the true identity of the rapist was uncertain (A. 58-59, 63, 67, 72-73, 81-82). It is important to note that petitioner did not allege in his petition and does not allege here that his counsel was incompetent and therefore unable to exercise professional judgment in matters relating to petitioner's defense.[13]

In *Sykes* this Court expressly declined to define the precise scope of the "cause" requirement. Whatever the content of that term, however, it should not include a situation like the one presently before the court where trial counsel objects to the evidence challenged in the habeas petition but on grounds other than those petitioner suggests, knew of the facts forming the basis for the objection suggested by petitioner and actually used those facts in the defense, is not alleged to be incompetent and demonstrates his competency by his conduct at trial and in securing an acquittal on one charge. To allow the cause requirement to be met by presuming that trial counsel inadvertently overlooked a possible constitutional issue would negate petitioner's burden, find no support in the state court record and render the cause requirement ineffectual in precluding habeas petitioners from asserting claims not raised at trial.

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13. On the basis of the state court record such a claim would be meritless. Trial counsel filed a number of pretrial motions, thoroughly cross-examined the State's witnesses, asserted the only reasonable defense to the State's strong case and secured the acquittal of petitioner on the armed robbery charge. Both State appellate courts that reviewed petitioner's conviction commented favorably on trial counsel's representation (A. 12, 107).

Neither has petitioner demonstrated, or can he demonstrate on the basis of the record before the Court, that he was actually prejudiced by the alleged constitutional violation. Petitioner's contention is that the Fourth Amendment was violated by the means used to secure evidence against him. The sanction imposed when evidence is seized contrary to the terms of the Fourth Amendment is exclusion of that evidence. The purpose of the exclusionary rule is to deter unlawful police conduct, not for a particular defendant's benefit, but for society's benefit. *United States* v. *Calandra,* 414 U.S. 338, 348 (1974). Accordingly, failure to exclude evidence illegally seized does not "prejudice" an individual defendant, but only prejudices society in its attempt to deter unlawful police conduct.

In any event, prejudice must mean more than merely harmful to the accused since all evidence introduced by the State is prejudicial in this regard or it is not relevant. Also, in the context of a waiver issue prejudice should not be equated with the harmless error doctrine applied in direct appeals where objection has been made in the trial court. Cf. *Stone* v. *Powell,* 428 U.S. 465 (1976). To equate the two would render the opinion in *Sykes* at best unnecessary and at worst meaningless because that case could have then been disposed of by merely applying the harmless error rule. Application of such a stringent standard also works against the societal interests sought to be protected by *Sykes* without advancing the constitutionally protected interests of the accused, foremost among which is the right to a fair trial. The test in habeas cases where the claimed error centers around the admission of certain items of evidence should be whether the evidence was so inherently unreliable as to impugn the integrity of the fact finding process and thereby deny

the petitioner a fair trial. Cf. *Stone* v. *Powell, supra.* This definition of prejudice serves to protect both the accused's right to collaterally attack a conviction which was the result of a "miscarriage of justice", *Wainwright* v. *Sykes, supra* at 4812, and society's interest in the finality of judgments. Under this analysis petitioner was not prejudiced.

The state trial court (A. 50) and the district court (A. 116) found that the in-court identification of petitioner was reliable in that Ms. Johnson had sufficient opportunity "to observe, to note and to remember her assailant apart and unaffected by any subsequent lineup identification" (A. 116). The positive in-court identification was not discredited by cross-examination and was as reliable as any in-court identification can be. After an evidentiary hearing the trial court found that the lineup procedures were not impermissively suggestive (A. 50) This finding has not been challenged in any state proceeding or in the habeas petition.[14]

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14. In this Court petitioner alludes to an "unnecessarily suggestive lineup" in that petitioner was the only participant wearing a white hat with a bandage on his right hand. Petitioner's Brief at 48, n. 54. Each participant wore the clothing in which he was arrested. No clothing was distributed at the lineup (A. 74, 85). Also the victim testified that she did not make the identification "by viewing the bandage" but "by his voice and face". (Tr. of Proceed., Aug. 23, 1971, p. 7). See, *Manson* v. *Brathwaite,* ——U.S.——, 45 L.W. 4681 (1977). The question of whether the lineup identification testimony was admissible holds little importance in the "prejudice" analysis since even if inadmissible the error was clearly harmless under the traditional harmless error doctrine.

Likewise there is no indication that petitioner's confession was untrustworthy. Indeed, the relevant circumstances compel a contrary conclusion. Petitioner was given, and acknowledged that he understood, the *Miranda* warnings three times before he confessed. Petitioner was advised of his *Miranda* rights at the time of the arrest in his home (A. 27). At the police station immediately after the line-up identifications, petitioner called one of the arresting officers off to the side and started to confess to the Johnnie Mae Johnson rape. The officer interrupted petitioner by saying "now wait a minute" and advised him of his rights (A. 56). Petitioner then confessed to raping Miss Johnson, but denied possessing a gun at the time and also denied raping Miss Alexander, the other rape victim who identified him in the line-up (A. 28-29). At this point the officer summoned a detective assigned to the case (A. 57). The detective re-advised petitioner of his constitutional rights and petitioner again confessed (A. 44).

No interrogation, no request for a statement was involved. When petitioner asked to see the officers and began to confess, he was stopped and re-advised of his rights. The voluntary nature of the statement and, therefore, its reliability is obvious. So found the trial judge and that finding has not been challenged in any proceeding (A. 50). It is also important to note, when considering whether the confession was "prejudicial", that the confession was at least partly responsible for petitioner's acquittal on the armed robbery charge. Apparently the jury believed petitioner's statement, including the portion wherein he denied possessing a gun at the time of the rape.

In conclusion petitioner has not and cannot on the basis of the record show sufficient "cause" to cure his failure to raise the arrest issue in the trial court. Nor can "prejudice" be shown in a habeas context since the evi-

dence allegedly secured as a result of an unlawful arrest violated no personal right of defendant and was not untrustworthy and therefore the proceedings against petitioner were not tainted or rendered unfair by the admission of such evidence.

B.

The Issue Is Not Cognizable Under The Habeas Corpus Act Since Illinois Provided The Opportunity For Full And Fair Litigation Of Petitioner's Fourth Amendment Claim And, If Relevant, The Evidence Sought To Be Excluded Was Reliable.

> ". . . [W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."
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> *Stone* v. *Powell*, 428 U.S. 465, 495 (1976) (footnotes omitted).

In order to determine whether the *Stone* v. *Powell, supra,* rationale bars petitioner's Fourth Amendment claim two questions must be addressed: (1) did the State of Illinois provide an opportunity for the full and fair litigation of petitioner's Fourth Amendment claim, and if so, (2) does the nature of the challenged evidence, i.e., identification testimony and confession, remove this case from the bar established in *Stone*?

The adequacy of the Illinois procedures can only be determined when they are judged against the purpose of the "opportunity for full and fair litigation" requirement.

The prime, if not the sole, purpose of the rule excluding illegally obtained evidence is to deter future unlawful police conduct. *United States* v. *Janis*, 428 U.S. 433, 446 (1976). The *Stone* court concluded that refusing to consider illegally seized evidence claims in habeas actions would not have an adverse impact on the deterrent effect of the exclusionary rule. 428 U.S. at 493. This is only true, however, if the State provides an opportunity for the litigation of Fourth Amendment claims. For if habeas relief is not available and state procedures are not available, then there is no incentive for police officers to abide by the requirements of the Fourth Amendment. They would then be free to ignore the constitutional rules governing searches and seizures because they would know that the issue could never be raised in state or federal proceedings. The Illinois procedures outlined above provide the opportunity for the full and fair litigation of Fourth Amendment claims. The fact that illegally seized evidence will be suppressed pursuant to these provisions guarantees continued deterrence of unlawful police conduct.[15] The fact that a defendant can waive his right under Illinois law to present search and seizure claims does not change this result unless it is presumed that Illinois police officers will ignore the Fourth Amendment in the hope that a defendant will not timely raise the issue in state court.

Petitioner claims that Illinois denied him the opportunity to litigate his claim because of his court-appointed attorney's non-tactical failure to raise the issue in the trial court. The "tactical failure" language employed by pe-

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15. Assuming that the exclusionary rule deters unlawful police conduct at all.

titioner is derived from this Court's decision in *Fay* v. *Noia*, 383 U.S. 391 (1963) and the Seventh Circuit Court of Appeals' decision in *United States ex rel. Allum* v. *Twomey*, 484 F. 2d 740 (7th Cir. 1973). Whatever the impact of *Wainwright* v. *Sykes*, *supra*, on these decisions, the fact remains that the "tactical failure" language was developed to assess claims of waiver. However, the waiver doctrine is distinct from the concern of the *Stone* Court that a state provide an opportunity for the litigation of issues. Waiver in effect is giving up one's right to assert a claim. The opportunity for full and fair litigation of a claim goes to the avenues a state provides by which a claim can be raised. A petitioner's attorney's decision not to raise an issue in state court may or may not constitute a waiver of the issue, but it does not in any way bear upon the availability of state avenues of relief. In other words, if the State has provided the opportunity to raise an issue, trial counsel's failure to make use of the opportunity does not alter the fact that the opportunity existed. Waiver not being an issue in the application of *Stone*, the "tactical failure" formula urged by petitioner is inapposite.[16]

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16. As noted previously, petitioner does not contend that his counsel was incompetent, nor could such a claim prevail on the record before the court. See, pp. 32-33 herein. Even if petitioner did allege that his counsel was incompetent by failing to assert the Fourth Amendment claim, the applicability of *Stone* would not be negated because the alleged incompetence would have no bearing on the deterrent effect of the exclusionary rule. As stated in *LiPuma* v. *Commissioner*, ——F. 2d——, n. 6 (2nd Cir. July 11, 1977):

The second question to be addressed is whether the nature of the evidence sought to be excluded by petitioner removes this case from the *Stone* holding.

Petitioner did not contend in his petition and does not contend here that the manner of securing the evidence affected its reliability. Therefore, the nature of the challenged evidence has no relevance in applying *Stone*. In this Court petitioner does attack the confession and identifications as intrinsically unreliable because the confession was fabricated and the lineup suggestive. This claim, however, is separate and distinct from the Fourth Amendment question presented in *Stone* and is not before the Court since it was not raised in the habeas petition.

If the nature of the evidence is relevant, this factor only lends further support to respondent's position that *Stone* bars relief. This is due to the fact that the challenged evidence was reliable. See, pp. 35-36 herein.

Finally, a brief response to petitioner's claim that the "flagrant" police misconduct distinguishes *Stone* is appropriate. Even assuming that the police were guilty of

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The fact that petitioner's claim is ostensibly grounded on the Sixth rather than the Fourth Amendment does not negate Stone's applicability because at the heart of this case lies an alleged Fourth Amendment violation. That is, should petitioner have succeeded in showing, in the state trial court, that the police entry into Room 613 was an unconstitutional search and seizure, the remedy decreed for such a violation would have been the exclusion of the allegedly "tainted" testimony of the police officers regarding the circumstances of LiPuma's arrest. The same remedy of exclusion is now sought by way of a collateral habeas corpus proceeding, where a Sixth Amendment claim has been added for good measure.

flagrant misconduct, that fact should not negate the applicability of *Stone* since "Even if one rationally could assume that some additional incremental deterrent effect would be present in isolated cases, the resulting advance of the legitimate goal of furthering Fourth Amendment rights would be outweighed by the acknowledged costs to other values vital to a rational system of criminal justice." *Stone* v. *Powell, supra,* at 493. More importantly, no objective assessment of the circumstances surrounding petitioner's arrest outlined above can support the conclusion that there was "flagrant misconduct". Any finding of "flagrant misconduct" would be impossible to reconcile with the fact that three Justices of the Seventh Circuit Court of Appeals held the arrest to be entirely lawful.

III.

RESPONDENT'S NOTICE OF APPEAL WAS TIMELY FILED BECAUSE THE HABEAS CORPUS ACT DICTATES THE PROCEDURES TO BE FOLLOWED IN OBTAINING A FINAL, APPEALABLE ORDER.

The order of the district court granting the habeas petition was issued on October 21, 1975. Twenty-eight days later respondent filed a "Motion To Further Stay Execution Of The Writ Of Habeas Corpus And To Conduct An Evidentiary Hearing" (A. 118-119). The district court granted the motion, further stayed execution of the writ and conducted an evidentiary hearing. After the hearing the court ruled that it properly granted the petition on October 21, 1975. The day after this ruling, January 27, 1976, respondent filed a notice of appeal.

Petitioner contends that respondent's motion for a further stay and evidentiary hearing was not filed within the mandatory time limitation (10 days) of Rules 52 and 59

of the Federal Rules of Civil Procedure and, therefore, did not toll the time within which to appeal from the "final order" of October 21, 1975. As a result respondent's notice of appeal was not filed within the 30 day limit of Rule 4 of the Federal Rules of Appellate Procedure and the court of appeals lacked jurisdiction over the case.

Respondent initially replies that the October 21, 1975 order was not a final order "leaving nothing to be done but to enforce by execution what had been determined", *Catlin* v. *United States,* 324 U.S. 229, 236 (1945), because all required procedures under the Habeas Corpus Act had not been completed at the time the order was issued.

Sections 2243 and 2254(d) of the Habeas Act require that an evidentiary hearing be conducted on a habeas petition unless the petition and return or answer present only issues of law. Also see, *Townsend* v. *Sain,* 372 U.S. 293 (1963). Elaborating on this requirement, Rule 8 of the recently enacted Federal Rules Governing § 2254 Proceedings provides:

> (a) Determination by court. — If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. *If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.*
> (Emphasis added.)

Thus, a truly final order in a habeas action can be entered only after the district court has completed the steps required by statute, including making the determination of whether an evidentiary hearing is required.

In the present case, the district judge's October 21, 1975 Opinion decided only respondent's preliminary Motion to Dismiss; it neither considered nor ruled on the desirability of an evidentiary hearing, although issues of fact were certainly present (see A. 111-117). Even though language used at the end of the end of the Opinion granting the Writ indicates a belief that the matter was being concluded in the district court, the Opinion cannot be considered a final order under 28 U.S.C. 2253 because it left unresolved the statutorily prescribed question of whether an evidentiary hearing would be required on the petition.

Respondent has been consistent throughout this action in maintaining that the October 21 Opinion was not a final order within the meaning of § 2253. Respondent's follow-up motion, far from being one for reconsideration, was entitled "Motion To Further Stay Execution Of The Writ Of Habeas Corpus and To Conduct An Evidentiary Hearing." (See A. 118-119). The Motion suggested that an evidentiary hearing should have been held before any order granting the Writ was issued; it cited the Habeas Corpus Act, *Townsend* v. *Sain,* 372 U.S. 293 (1963) and *United States ex rel. McNair* v. *State of New Jersey,* 492 F. 2d 1307, 1309 (3rd Cir. 1974), as supporting the respondent's right to present evidence outside the record on disputed issues. The Motion pointed out that there had never been a state or federal hearing on the validity of petitioner's arrest, and thus if the petition stated a cognizable cause of action, the trial record alone could not be dispositive of the factual questions underlying the probable cause issue.

It was only after conducting the evidentiary hearing on January 7, 1976, listening to the arguments of counsel and issuing its Order of January 26, 1976, that the District

Court completed all the steps required by statute in a case such as the present one. Thus the final, appealable decision of the district judge was his January 26 Order issuing the Writ "with execution stayed for five days pending prompt filing of notice of appeal and application to the Court of Appeals for a further stay." (A. 161).[17]

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17. Even if the October 21, 1975 Opinion and Order of the District Court were considered to be a final order, standing alone, still the time for appeal is properly computed from the January 26, 1976 disposition of the points raised by respondent's "Motion To Further Stay . . . And To Conduct An Evidentiary Hearing." In the directly analogous case of *United States* v. *Dieter*, ——U.S.——, 97 S. Ct. 18 (1976), this Court held that a government "Motion To Set Aside The Order Of Dismissal" of an indictment rendered the original judgment "non-final for purposes of appeal for as long as the petition is pending." 97 S. Ct. at 19. The Court said this ruling applied whether the issue raised in the government's motion was termed one of law or of fact, and regardless of the lack of a statute or a provision of Rule 4(b), F.R.A.P., expressly authorizing treatment of a post-dismissal motion as suspending the appeal limitation period. This decision and the earlier one of *United States* v. *Healey*, 376 U.S. 75, were based rather on traditional and virtually unquestioned practice rooted in considerations of judicial economy.

Since traditional habeas corpus practice as outlined in the Rules Governing § 2254 Cases contemplates an evidentiary hearing in the present type of case, and since much appellate court time would have been wasted if an appeal had been necessary just to obtain an evidentiary hearing, the principles of the *Dieter* and *Healy* cases logically apply here and require that the October 21 Opinion be considered non-final for purposes of appeal by operation of respondent's subsequent Motion.

Respondent's Notice of Appeal filed the next day, January 27, 1976, was consequently a timely notice under Rule 4(a) of the Federal Rules of Appellate Procedure.

Secondly, respondent submits that the district court was in no way bound to apply Rule 52 or 59 of the Federal Rules of Civil Procedure in this habeas action. Indeed, the Habeas Corpus Act, and the traditional practice pursuant to it, take precedence over the Federal Rules of Civil Procedure in delineating the course of a federal habeas action. As Rule 81(a)(2), Federal Rules of Civil Procedure has stated since 1968 regarding the applicability of the Civil Rules to habeas corpus procedures:

> (2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. . . .

The new Federal Rules Governing § 2254 Proceedings For the United States District Courts now plainly provide at Rule 11:

> The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, *may be applied, when appropriate,* to petitions filed under these rules. (Emphasis added).

The fact that the district court judge granted respondent's motion to further stay execution of the writ and conduct an evidentiary hearing establishes that he chose not to apply Rule 52 or 59 in this particular case. This act was within the district court's discretion. The strict manner in which petitioner would apply Civil Rules 52 and 59 to the facts of this case is totally inconsistent with the provisions of the Habeas Corpus Act and totally inconsistent with the

above-cited Rules themselves. The second paragraph of Rule 4(a), F.R.A.P. cannot be logically read to impose Civil Rules 52 and 59 in the most literal, technical way on habeas proceedings in direct contravention of Rule 81 (a)(2) and habeas Rule 11 above.

CONCLUSION

For the reasons stated above, the Respondent respectfully requests that this Court affirm the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General, State of Illinois,
DONALD B. MACKAY,
MELBOURNE A. NOEL, JR.,
RAYMOND MCKOSKI,
Assistant Attorneys General,
188 W. Randolph St. (Suite 2200),
Chicago, Illinois 60601,
(312) 793-2570.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 76-5325

BEN EARL BROWDER, Petitioner,

-vs-

DIRECTOR, DEPARTMENT OF CORRECTIONS
OF ILLINOIS, Respondent.

REPLY BRIEF OF PETITIONER BEN EARL BROWDER

Kenneth N. Flaxman
5549 North Clark Street
Chicago, Illinois 60640
(312) 728-3525

Attorney for Petitioner

Of Counsel:

John T. Moran
John M. Kalnins
Thomas R. Meites

Office of the Public Defender

JAMES J. DOHERTY
Public Defender

407 CIVIC CENTER
CHICAGO, ILLINOIS 60602
(312) 443-6350

October 27, 1977

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

att: Ms. June Hoffman

re: Browder v. Director, No,76-5325

Dear Ms. Hoffman,

Kenneth Flaxman has asked me to send the following errata sheet in connection with the reply brief delivered to your office on October 26, 1977.

1. The line concluding page 3 should contain the word "timely" at its end. This line should read as follows:

be corrected on appeal,[3/] but only if notice of appeal was timely.

2. The first word of the first line on page 29 ("These") should not be capitalized.

3. 12 lines were omitted from the beginning of the material starting on page 35. The material to be inserted is attached to this letter.

Very truly yours,

John M. Kalnins
Assistant Public Defender

cc: Raymond McKoski, Esq.

JMK:so

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TABLE OF AUTHORITIES

IN THE
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BEN EARL BROWDER, Petitioner,

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DIRECTOR, DEPARTMENT OF CORRECTIONS
OF ILLINOIS, Respondent.

REPLY BRIEF OF PETITIONER BEN EARL BROWDER

Introduction

This case arises from the warrantless arrest of all the teen-age black males found in a dwelling; the arrests were made to determine which arrestee, if any, should be charged with an offense committed two days before. After the state courts had refused to adjudicate petitioner's claim that this arrest was unlawful, the United States District Court granted petitioner's application for a writ of habeas corpus, finding, inter alia, that the arrest was unlawful. The Court of Appeals reversed in an "unpublished order," and this Court granted certiorari to consider the Fourth Amendment issues, in addition to a number of other questions presented in the petition. The Fourth Amendment issues need not be reached, however, if the Court accepts our contention that the Director's notice of appeal was untimely to vest the court of appeals with jurisdiction to review the district court's final order. In this reply brief, we respond to the arguments raised by the Director, some of which we contend have been waived or abandoned in the district court and in the court of appeals.

I. THE COURT OF APPEALS LACKED JURISDICTION TO REVERSE THE FINAL ORDER OF THE DISTRICT COURT

The Director concedes that the district court's order of October 21, 1975 (App. 110) granting petitioner's application for a writ of habeas corpus indicates "that the matter was being concluded in the district court." (Resp.Br. 43.)[1/] This, of course, is the hallmark of a final order. See Bostwick v. Brinkerhof, 106 U.S. 1, 3-4 (1882). The two theories offered by the Director to explain its failure to have acted with the jurisdictional time limits of F.R.A.P. 4(a) to perfect an appeal from this final order, as authorized by 28 U.S.C. §2253, are equally devoid of merit.

1/ The Director refers (Resp.Br. 43) to the memorandum opinion of October 21, 1975 (App. 111-17) as the "order" in question. This is incorrect. The order granting the petition was entered on October 21, 1975 (App. 1), in a separate document. (App. 110.)

1. The Director contends that the order of October 21, 1975 was not final because "it left unresolved the statutorily prescribed question of whether an evidentiary hearing would be required on the petition." (Resp. Br.46.) This contention is frivolous -- the district judge obviously concluded that an evidentiary hearing was not required when he discharged his duty under 28 U.S.C. §2243 to "summarily hear and determine the facts" and granted the petition on the state court record.[2/] If the district court had erred in failing to hold an evidentiary hearing, this error could be corrected on appeal,[3/] but only if notice of appeal was

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2/ The power to grant a habeas corpus petition without an evidentiary hearing was explicitly recognized in Walker v. Johnson, 312 U.S. 284 (1941), and was subsequently codified in 28 U.S.C. §2243. See Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 498 (1973).

While the Rules Governing Section 2254 Proceedings are inapplicable to this case, see infra at 5 n. 6, we note that the power to grant a habeas corpus petition without an evidentiary hearing is specifically recognized in Rule 8(a) of these rules, which provides, in pertinent part: "If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require." Thus, as the Court noted in Blackledge v. Allison, ___ U.S. ___, 97 S.Ct. 1621 (1977), a district judge "may employ a variety of measures to avoid the need for an evidentiary hearing." Id. at ___, 97 S.Ct. at 1633.

3/ See, e.g., United States ex rel. McNair v. New Jersey, 492 F.2d 1307, 1309 (3d Cir. 1974); Sosa v. United States, 550 F.2d 244, 250 (5th Cir. 1977). Cf. Dorszynski v. United States, 418 U.S. 424 (1974) (failure of district judge to have made explicit "no benefit" finding under Youth Correction Act, 18 U.S.C. §5010(d), reversed on review of final decision.

2. Alternatively, the Director argues that its motion to reconsider,[4/] filed 28 days after entry of the final order, tolled the time to appeal. (Resp.Br. 44 n. 17.) To accept this argument, the Court must reject the uniform decisions among the courts of appeals[5/] in favor of the Director's assertion that the tolling rules of F.R.A.P. 4(a) are inapplicable to habeas corpus proceedings. (Resp. Br. 46.) The Rules of Appellate Procedure, however, are fully applicable to habeas corpus proceedings, see F.R.A.P. 1, and the Director's argument to the contrary must be rejected.

The Director's argument is two fold. First, the Director asserts that the tolling rules of F.R.A.P. 4(a) are in "direct contravention" of Civil Rule 81(a)(2) and Rule 11 of the Rules Governing Section 2254 Proceedings. (Resp.Br. 46.) The Rules Governing Section 2254 Proceedings

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4/ While the Director claims that its post-final order request that the district court receive further evidence on the existence of probable cause was "far from being one for reconsideration" (Resp.Br. 43), that motion was predicated on the assertion that the district court had "erred in granting the writ without first conducting an evidentiary hearing." (App. 118, ¶2.) This, of course, was a request to reconsider disposition of the case without an evidentiary hearing. In denying this motion, the district court stated, in part, that "The motion to reconsider is denied." (App. 161.)

5/ See, e.g., Flint v. Howard, 464 F.2d 1084, 1086 (1st Cir. 1972); Rothman v. United States, 508 F.2d 648, 651 (3d Cir. 1975); Martin v. Wainwright, 469 F.2d 1072, 1073 (5th Cir. 1973); United States v. Braasch, 542 F.2d 442, 444-45 (7th Cir. 1976).

are inapplicable to this case,[6] and it is difficult to conceive of any way in which the tolling rules of F.R.A.P. 4(a) may be in "direct contravention" of Civil Rule 81(a)(2), which was amended in 1968 to delete "references to appellate procedure made inappropriate by the adoption of the Federal Rules of Appellate Procedure. Harris v. Nelson, 394 U.S. 286, 293 n. 3 (1969).[7]

Second, the Director relies on United States v. Dieter, 429 U.S. 6 (1976), and its application of the

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6/ Pub.L. 94-426, §1, 90 Stat. 1334 (September 28, 1976), made the Rules Governing Section 2254 Proceedings applicable to cases commenced on or after February 1, 1977. This case was commenced on January 8, 1975. (App. 1.)

7/ Prior to 1968, when the Federal Rules of Appellate Procedure became effective, appellate procedure was governed by local appellate rules and by the Rules of Civil Procedure. (Congress first vested this Court with explicit rule making authority over the courts of appeals in civil cases in 1966, Pub.L. 89-773, 80 Stat. 1323 (November 6, 1966).) Prior to that time, uniform rules for appellate procedure had been promulgated only insofar as practice in the district court pertained to appeals. See Stern, Changes in the Federal Appellate Rules, 41 F.R.D. 297 (1967).

Former Civil Rule 73 set out the time limits for the filing of a notice of appeal, and contained the tolling rules carried over into present Rule 4(a) of the Rules of Appellate Procedure. Former Civil Rule 81(b) expressly provided that the Rules of Civil Procedure governed appeals in habeas corpus cases:

> In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice is not set forth in statutes of the United States and has heretofore conformed to the practice in actions in law and suits in equity: admission to citizenship, habeas corpus . . .

tolling rules of United States v. Healey, 376 U.S. 75 (1964) to requests for reconsideration filed by the government in criminal cases. (Resp.Br. 44 n. 17.) There is no statute or rule governing the timeliness of a petition for rehearing in criminal cases, United States v. Healey, at 79, and a petition for rehearing is timely if filed prior to expiration of the time in which an appeal could be perfected. Id. at 77. F.R.A.P. 4(a), however, governs the timeliness of petitions for rehearing in habeas corpus cases, and as the Court noted in United States v. Dieter, supra, it is only "timely petitions for rehearing . . . [which render] the original judgment nonfinal for purposes of appeal." Id. at 8.

In this case, the petition for rehearing was not timely, and notice of appeal was not filed until 128 days had passed after entry of the final order. The court of appeals therefore lacked jurisdiction to review the final order of the district court, and the decision below must be reversed, and the case remanded to the district court to reinstate its writ of habeas corpus.

II. A COURT OF APPEALS MAY NOT DECIDE FACTUAL ISSUES DE NOVO

The Director recognizes (Resp.Br. 8) that the court of appeals reversed the decision of the district court on its independent appraisal of disputed facts. But rather than respond to our argument that a federal court of appeals may not decide factual issues de novo (Pet.Br. 23-25), the Director seeks to mislead the Court by stating that we do not contest the facts as found in the first instance by the court of appeals. (Resp.Br. 13-14.) This is incorrect. In our view, the court of appeals -- if it had jurisdiction to reach the merits -- should have viewed the record in the light most favorable to petitioner, the prevailing party in the district court, and reviewed the decision of the district court on the assumption that petitioner, along with the three other teen-age black males found in the Browder residence, had been arrested on the basis of "information" received from a "known informer," referred to in the police report. (App. 159, introduced into evidence at App. 148.) On these facts, as the district court found (App. 114), petitioner was the victim of an unlawful arrest. See Henry v. United States, 361 U.S. 98 (1959); Beck v. Ohio, 379 U.S. 89 (1964).

Determination of what facts were known to the police at the time of arrest was the duty of the district

judge.[8/] The district judge in this case was uniquely qualified to evaluate the testimony of law enforcement officers -- Judge Flaum came to the bench after a distinguished career as a prosecutor for Cook County, Illinois, as an assistant Attorney General of Illinois, and as First Assistant to the United States Attorney for the Northern District of Illinois. As the Director does in this Court (Resp.Br. 3-5), and as it did in the court of appeals, the Director had sought to convince Judge Flaum that the evidence presented at the evidentiary hearing proved that the police had probable cause to believe that the offender sought was either petitioner or his brother Tyrone Browder. (Record Item No. 32, 2-4). Petitioner vigorously disputed this contention, arguing that the police testimony was inherently incredible, that it was impeached by a contemporaneous arrest report, and that it was in irreconciliable conflict with testimony given by the officers at the state court trial. (Record Item No. 31, 3-7.) Judge Flaum refused to accept the Director's arguments, and reaffirmed his earlier decision to grant the petition (App. 161) -- a decision which had been based on the factual finding that there was "no basis upon which the arresting officer might have formed a belief that petitioner Browder raped Ms. Alexander." (App. 114.)

8/ See Mapp v. Ohio, 367 U.S. 643, 653 (1961): "Reasonableness is in the first instance for the [trial court] . . . to determine." (quoting United States v. Rabinowitz, 339 U.S. 56, 63 (1950)

In reversing the decision of the district court, the court of appeals did not explicitly decide that the district court had misapprehended the law -- both the court of appeals and the district court cited Beck v. Ohio, 379 U.S. 89 (1964) for the test of probable cause to arrest. (App. 114 (district court); App. 166 (court of appeals.) The court of appeals did not conclude that any of the explicit or implicit findings of fact made by the district court were clearly erroneous -- there is, in fact, no mention of any of the district court's findings in the opinion of the court of appeals. Nor did the court of appeals follow its ordinary practice of reading the record in the light most favorable to the appellee.[9/] Rather, as the Director concedes (Resp.Br. 8), the court of appeals reversed because it held "that the facts developed at the evidentiary hearing established probable cause for petitioner's arrest." This a court of appeals may not do:

> On appeal, the task of a Court of Appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district court and of this court. If it concludes that the findings of the District Court are clearly erroneous, it may reverse them under F.R.C.P. 52(a). If it determines that the District Court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors. Dayton Board of Education v. Brinkman, ___ U.S. ___, ___, 97 S.Ct. 2766, 2744 (1977).

9/ See, e.g., Aunt Mid, Inc. v. Fjell-Orange Lines, 458 F.2d 721 (7th Cir. 1972); George v. American Airlines Inc., 295 F.2d 311 (7th Cir. 1961); Lewis Mach. Co. v. Aztec Lines, 172 F.2d 746 (7th Cir. 1959).

The Director has properly withheld the argument, as made in connection with the applicability of F.R.A.P. 4(a) to habeas corpus proceedings (Resp.Br. 46), that the ordinary standards of appellate review are in "direct contravention" of the conformity clause of Civil Rule 81(a)(2). Final orders in habeas corpus proceedings under 28 U.S.C. §2254 are reviewable "on appeal," 28 U.S.C. §2253, and the same standards of appellate review applied in civil and criminal cases are applicable to appeals in habeas corpus cases.[10/]

10/ It is no accident that, as the Court held in Wade v. Mayo, 334 U.S. 672, 683-84 (1948), the "clearly erroneous" standard is applicable to appeals in habeas corpus proceedings.

When Congress extended federal habeas corpus to state prisoners in the Act of February 5, 1867, ch. 38, 14 Stat. 385, it had the option of precluding appellate review entirely, as when it subsequently curtailed the jurisdiction of this Court in the Act of March 27, 1868, ch. 34, ¶2, 15 Stat. 44. See Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1868).

Once Congress had determined that there should be appellate review, it had three different forms of review from which to choose. First, review could have been by writ of error, where the reviewing court was limited to consideration of questions of law. See, e.g., Stanley v. Board of Supervisors, 121 U.S. 535 (1887). Second, review could have been by appeal, a form of review made available for equity cases by the Act of March 3, 1802, 2 Stat. 244, §2. Review in equity cases followed the common law model, McCollum v. Eager, 43 U.S. (2 How.) 61 (1844), and factual findings were reviewed under the "clearly erroneous" standard. See, e.g., Furrer v. Ferris, 145 U.S. 132 (1892).

The third form of review that could have been adopted was that then extant in admiralty cases, where additional evidence could be received on appeal. See Former Admiralty Rule 49, promulgated 54 U.S. (13 How.) vi (1851); The Morning Star, 14 F. 866, 867 (C.C.N.D. Ill. 1882) ("It is also a matter of everyday practice for additional testimony to be taken on both sides in the circuit court, and that testimony may entirely change the case as it stood before the district court.")
(cont.)

As we have suggested (Pet.Br. 25), the court of appeals may have reversed on the basis of a Fourth Amendment standard different than that applied by the district court. In our view, the Fourth Amendment standard implicit in the decision of the court of appeals is plainly wrong; if, however, this Court accepts the legal standard applied by the court of appeals, and concludes that notice of appeal was timely, the case must be remanded to the district court for further findings of fact.

(cont)

Rather than limit review to that available by writ of error, or allow a trial de novo on appeal, as in admiralty cases, Congress mandated that the final decision in habeas corpus cases could be reviewed "on appeal." A reviewing court is therefore limited to determining whether factual findings are "clearly erroneous," i.e., whether "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). And it is the burden of the appellant to "demonstrate that there is no rational basis for the District Judge's decision." United States v. W.T. Grant, 345 U.S. 629, 634 (1953).

II. THE SEIZURE OF PETITIONER'S PERSON WAS CONTRARY TO THE FOURTH AMENDMENT

If the Court chooses to reach the merits of the Fourth Amendment issues in this case, and does not reverse because of the Director's failure to have filed a timely notice of appeal, there are two grounds to hold that the seizure of petitioner's person was contrary to the Fourth Amendment. First, the arresting officers lacked a sufficient quantum of probable cause. (Pet.Br. 27-30.) Second, investigative arrests are per se unlawful unless, at a minimum, they have been authorized by a judicial officer. (Pet.Br. 30-35.)

In an attempt to meet these arguments, the Director seeks to characterize the warrantless arrest of all four teen-age males found in the Browder residence as a "reasonable course of action." (Resp.Br. 16.) In this vein, the Director's brief reads as if this was a case where the police, immediately upon receiving reliable information that a crime had been committed by a teen-age black male whose surname was Browder, and who lived in the 4000 block of West Monroe Street, determined that the only Browder family on that block resided at 4037 West Monroe Street, traveled to that address, learned that there were two persons fitting the description of a dark complected black teen-age male whose surname was Browder, and placed both

under arrest. (Resp.Br. 3-4.) Even viewed in the light most favorable to the respondent -- the losing party in the district court -- the record fails to support this mythical fact pattern.

In this case, two days elapsed before the police decided to act on the information claimed to have been received immediately after commission of the crime in question. (App. 135.) The reliability of this information is uncertain: It came either from the rape victim (App. 130, 140) or from a "known informant." (App. 159, introduced into evidence at App. 148.) Regardless of the source of the information, it lacked specificity. At best, the police believed that the offender sought was a "teen-aged Browder, like 15, 16, 17, 18" (App. 146), who lived in the "4000 block of West Monroe (App. 140), of unknown height and weight. (App. 128.) Once the police determined that a Tyrone Browder, whose address was 4037 West Monroe Street, had an arrest record (App. 139), no attempt was made to determine if another Browder family resided in the 4000 block of West Monroe Street. The multiple suspect arrest was not a response to an unforseen situation; the police claimed to have telephoned ahead to the Browder residence and knew that "the gentlemen would be waiting." (App. 62-63.) Nor is this a case where, after entering the home, the police seized only two teen-age "Browder's." The Director concedes (Resp.Br. 17) that --

contrary to Officer Conroy's testimony in the district court (App. 143) -- all four teen age black males found within the Browder residence were arrested. Finally, the arrests were not made so that the suspects could be charged with an offense; here, petitioner and the three other "suspects" were taken into custody so that they could be placed in a lineup to determine which one, if any, would be identified by an eyewitness.[11/]

The Director's argument that petitioner was arrested on probable cause (Resp.Br. 13-18) is based on a jaundiced view of the facts, and ignores the fact that, as in Wong Sun v. United States, 371 U.S. 471 (1963), there is no showing that the police had narrowed the scope of their search to any particular person.

11/ The blatant investigative purpose of the arrest was admitted by the principal arresting officer in the district court (App. 147-48):

> Q: All right: Isn't it true, sir, that the purpose behind your arrest of the teen-aged Browders was to bring them down to the station to place them in a line-up?
>
> Officer Conroy: To see if they could be identified by the victim. To see which one would be identified, yes, sir.
>
> Q: At the time you arrested both Browders you didn't know which one, if either, would be the one who would be identified?
>
> A: That is correct, sir.

Contrary to the Director's suggestion (Resp.Br. 17), the fact that all of the black teen-age males found within the Browder residence were placed under arrest cannot be ignored. Seizure of all of the teen-age males found within the dwelling is identical to the seizure of the entire contents of a dwelling condemned as contrary to the Fourth Amendment in Kremen v. United States, 353 U.S. 346 (1953) and Von Cleef v. New Jersey, 395 U.S. 814 (1969). The Director, as the dissenters in Kremen v. United States, supra, would factionalize the seizures, and consider only whether there was "a sufficient factual basis to support a particular arrest." (Resp.Br. 15.) This analysis, if accepted, would undo the protections of the Fourth Amendment "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." United States v. Martinez-Fuente, 428 U.S. 535, 554 (1976).

The Director attempts to analogize the dragnet arrest in this case to a situation where "reasonable grounds exist for the arrest of more than one person," (Resp.Br. 15), such as when a police officer observes two persons standing over a dead man, and each accuses the other of murder. (Resp.Br. 15 n. 3.) But this is not a case in which the police acted as if they had reached the "reasonable conclusion" (Resp.Br. 16) that either petitioner or his

brother had committed the crime under investigation.[12] First, the officers were easily able to differentiate between petitioner and his brother -- petitioner was the only person seized at the Browder dwelling who had his arm in a "bandage or cast." (App. 20, 25.) Second, the possibility that the officers had suspected only the two Browder brothers is undercut by the fact that all four teen-age black males -- including two whose surname was not Browder -- were arrested.

But even if the police had "reasonable grounds" to believe that the offender sought was a "teen-aged Browder, like 15, 16, 17, 18" (App. 146), the investigative seizures must be considered together with the fact that, as in Davis v. Mississippi, 394 U.S. 721 (1969), "the detention at police headquarters of petitioner and the other young Negroes was not authorized by a judicial officer." Id. at 728. The Director reads Davis, and its suggestion that investigative detentions might be lawful if undertaken pursuant to a narrowly circumscribed procedure, 394 U.S. at 728, as irrelevant because there was a sufficient quantum of "probable cause" in this case to arrest petitioner, his brother, and any other teenagers whose surname could have been Browder. In our view, the teaching of Davis is

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12/ The Director suggests that the police may have suspected both petitioner and his brother of having perpetrated the crime under investigation. (Resp.Br. 16.) While the eyewitness had described two offenders, she had told the police that one was light-complected and the other dark complected. (App. 126.) As the Director notes (Resp.Br. 16 n. 4): "Both [petitioner and his brother] were dark-complexioned male Negroes."

that detentions for investigation -- as the arrests in this case unabashedly were -- are per se unlawful unless, at a minimum, they are authorized by a judicial officer.

If allowed to stand, the decision of the court of appeals finding that petitioner was lawfully arrested would vest law enforcement officials with the unbridled power to seize a number of suspects to determine which one, if any, should be charged with an offense. This holding destroys the "practical compromise," Gerstein v. Pugh, 420 U.S. 103, 113 (1975), of probable cause, and must be reversed.

IV. THE WARRANTLESS SEARCH OF PETITIONER'S DWELLING WAS CONTRARY TO THE FOURTH AMENDMENT

Even though two days had elapsed before the police decided to act on the information allegedly received from the rape victim the police did not seek a warrant prior to embarking on their expedition to the Browder residence to search for and to seize all teen-aged black males who would be found therein. The Director contends that a person at home does not have a greater right of privacy than when on the public street (Resp.Br. 23-24), and argues that the Fourth Amendment does not require that a disinterested judicial officer warrant the need to search a dwelling when the seizure of a person, rather than the seizure of papers and effects, is sought. (Resp.Br. 25.)

1. To accept the Director's arguments would be to "read the Fourth Amendment out of the Constitution." Coolidge v. New Hampshire, 403 U.S. 443, 480 (1971) (opinion of Stewart, J.) As the Director recognizes (Resp.Br. 20), the primary purpose of the Fourth Amendment was to curb searches made under general warrants in England and writs of assistance in the colonies.[13/] The principal evil of the

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13/ See Stone v. Powell, 428 U.S. 465, 482 (1976); Stanford v. Texas, 379 U.S. 476, 480-86 (1965); Marcus v. Search Warrant, 367 U.S. 717, 724-29 (1961); Boyd v. United States, 116 U.S. 616, 624 (1886).

general warrants and writs of assistance was that they placed "the liberty of every man in the hands of every petty officer,"[14/] by allowing searches under unchecked general authority.

The Director would reject the solution adopted by the Framers of the Fourth Amendment to keep "the liberty of every man" out of "the hands of every petty officer" -- the institution of the search warrant, which interposed a disinterested judicial officer between the citizen and arbitrary police power. As the Court explained in McDonald v. United States, 335 U.S. 451 (1948), a "search warrant serves a high function."

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency the Fourth Amendment has interposed a magistrate bewtween the citizens and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing and history shows that the police acting on their own cannot be trusted. So the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that exigencies of the situation made that course imperative. Id. at 455-56.

14/ Boyd v. United States, 116 U.S. 616, 625 (1886), quoting the arguments of James Otis against reissuance of writs of assistance in Boston following the death of George II in 1761. See Wroth & Zobel (eds.), Legal Papers of John Adams, 141-42 (1965).

Apparently, the Director fails to grasp the "point of the Fourth Amendment," as clearly articulated in the oft quoted words of Mr. Justice Jackson in Johnson v. United States, 333 U.S. 10 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its prohibition consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competive enterprise of ferreting out crime . . . When the right of privacy must reasonably yield to the right of search is, as a rule- to be decided by a judicial officer, not by a policeman or government enforcement agent. (Id. at 13-14.)

Only last term, the Court reaffirmed the importance of the Warrant clause as the primary safeguard against "unreasonable governmental invasions of legitimate privacy interests." United States v. Chadwick, ___ U.S. ___, 97 S.Ct. 2476, 2483 (1977). It is this safeguard which the Director would eliminate solely because the search of petitioner's dwelling resulted in the seizure of a person, rather than papers or effects.

The point overlooked by the Director is that the Fourth Amendment protects two distinct privacy interests -- the right to be free of unreasonable seizures, and the right to be free of unreasonable searches. See G.M. Leasing Corp.

v. United States, 429 U.S. 338, 352-53 (1976). The requirement that arrests be based on probable cause protects an individual's rights to be free from unreasonable seizures. United States v. Santana, 427 U.S. 38 (1976). But greater interests are at stake in a dwelling search, which involves a separate intrusion into privacy. The "normal Fourth Amendment rule," G.M. Leasing Corp. v. United States, at 358, is that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." Ibid, quoting Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967).[15/]

2. The Director seeks an exception to the "normal Fourth Amendment rule" by relying on "the common law rule" permitting warrantless entries to arrest. (Resp.Br. 21.) But as the Director recognizes (Resp.Br. 20), there is no evidence to suggest that the Framers intended to incorporate such an exception into the Fourth Amendment. This would have been contrary to the broad protections of that amendment against "the searches and seizures which deeply concerned the colonists, and which were foremost in the minds of the Framers . . . those involving invasions of the home. . . " United States v. Chadwick, ___ U.S. ___, ___, 97 S.Ct. 2476, 2482 (1977). The nineteenth century state common law opinions which apply this "common law rule"[16/] are in obvious conflict with the development of "the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth." United States v. Chadwick, supra.

15/ Contrary to the Director's assertion (Resp.Br. 23), an arrest warrant would have been constitutionally insufficient to authorize the entry of the Browder dwelling which preceded the arrests. See Government of Virgin Islands v. Gereau, 502 F.2d 914, 928 (3d Cir. 1974).

An arrest warrant may be secured upon a showing that an offense has been committed, and that there is reasonable ground to believe that a particular person has committed that offense, i.e., that a specific person is "seizable." See Whiteley v. Warden, 401 U.S. 560, 564-66 (1971). The additional privacy interests which yield in a dwelling entry require the added showing that a seizable item is in the place whose search is authorized. See Rugendorf v. United States, 376 U.S. 528, 533 (1964); Aguilar v. Texas, 378 U.S. 108, 114 (1964).

16/ See, e.g., Commonwealth v. Reynolds, 120 Mass. 190 (1876), where the Court stated: "The doctrine that a man's house is his castle, which cannot be invaded in the service of process, was always subject to the exception that the liberty or privilege of the house did not exist against the king. It had no application, therefore, to the criminal process." Id. at 196. Reynolds relied upon Commonwealth v. Irwin, 83 Mass. 587 (1861), and was in turn relied upon in State v. Mooring, 115 N.C. 709 (1894). Mooring was cited in Love v. United States, 170 F.2d 32 (4th Cir. 1948), and the Massachusetts cases found their way into the federal reports via two Tennessee decisions. See McCaslin v. McCord, 116 Tenn. 690, 707, 94 S.W. 79, 83 (1906) (dictim); Smith v. Tate, 143 Tenn. 268, 227 S.W. 1026, 1027 (1921); Reichman v. Harris, 252 F. 371, 380 (6th Cir. 1918) (dictim); Gatewood v. United States, 209 F.2d 789, 791 n. 3 (D.C. Cir. 1953) (dictum).

The "common law authorities" were seriously questioned by Judge Prettyman in Accarino v. United States, 179 F.2d 456 (D.C. Cir. 1949), and have been rejected by a number of jurisdictions which have considered the vitality of the "common law rule" in light of development of the Fourth Amendment. See Pet.Br. 40 nn. 40, 41. Those jurisdictions which have adhered to the "common law rule" have deferred to this Court's resolution of the question. See, e.g., State v. Perez, 277 So.2d 778, 783 (Fla. 1973); State v. v. Pontier, 95 Ida. 707, 713, 518 P.2d 969, 975 (1975).

3. The Director incorrectly asserts that the Court has "acknowledge[d] the validity of the common law rule permitting warrantless entries [to arrest]." (Resp. Br. 21.) On the contrary, the Court has repeatedly and explicitly reserved consideration of this "grave constitutional question." Jones v. United States, 357 U.S. 493, 499 (1958). See Coolidge v. New Hampshire, 403 U.S. 443, 491-92 (1971) (Harlan, J., concurring); United States v. Santana, 427 U.S. 38, 45-46 (1976) (Marshall, J., dissenting).

Contrary to the Director's contention, Johnson v. United States, 333 U.S. 10 (1948) is flatly incompatible with any notion of a general right of warrantless entry for the purpose of arrest.[17/] In Ker v. California, 374 U.S. 23 (1967), the Court was evenly divided on the lawfulness of the entry, search, and arrest under Fourth Amendment

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17/ In Johnson, narcotics officers had recognized the distinctive odor of burning opium coming from within a hotel room. They knocked and, when Johnson answered, pushed past her into the room, found narcotics paraphernalia, arrested her, and seized it. The Court held the initial entry into the room to be unlawful, and rejected the government's attempt to sustain the entry as incidental to Johnson's arrest. The entry had preceded the arrest, and the fact discovered upon entry, i.e., that Johnson was alone in the hotel room, was held to be necessary to furnish probable cause for her arrest. The entry was therefore unlawful, and tainted all that followed.

While the Court in Johnson did not further discuss the conditions of allowable arrest entry, the Court's analysis in that case assumes that there is no right to enter without a warrant simply on probable cause to arrest. The police were confronted with an occupied room in which opium was burning, and could reasonably believe that someone in that room was committing an offense. This quantum of probable cause, however, was deemed insufficient to allow the arrest entry.

standards,[18/] but the four members of the Court who joined with Mr. Justice Harlan in voting to affirm found exigent circumstances to excuse any need for a warrant. Id. at 40. Neither Miller v. United States, 357 U.S. 301 (1958) nor Sabbath v. United States, 391 U.S. 585 (1968) involved the Fourth Amendment; in both cases, the Court held an entry unlawful because of non-compliance with the "knock and announce" requirements of 18 U.S.C. §3109.

4. The Director's attempt to show exigent circumstances to justify the warrantless home entry (Resp.Br. 28) must be rejected. The unexplained two day delay in following up on the information allegedly provided to the police by the rape victim conclusively shows the absence of any exigency. See G.M. Leasing Co. v. United States, 429 U.S. 338, 361-62 (1976) (Burger, C.J., concurring).

5. The Director's argument that the "mobility factor" (Resp.Br. 23) requires that persons be afforded less protection from dwelling searches than papers or effects is frivolous and has no place in this case, where the police claimed to have telephoned ahead to advise Mrs. Browder that

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18/ Mr. Justice Harlan voted to affirm on the ground (rejected by the other members of the Court) that Fourteenth Amendment standards regulating state police searches and seizures are not coincident with those which the Fourth Amendment imposes on federal officers. 374 U.S. at 44-46.

they were coming for her sons,[19] and where the police had waited two days after allegedly learning that the suspect sought resided in the 4000 block of West Monroe Street before following up on that information. The officers' own testimony shows that this was not a case where an arrest was necessary "now or never." Roaden v. Kentucky, 413 U.S. 496, 505 (1973).

Even if the actions of the police were not sufficent to rebut the possibility of any need for prompt action, the "mobility factor" argument must be rejected. A person is certainly less mobile than flash paper -- which disintegrates when ignited -- or small quantities of narcotics -- which may be promptly disposed of in a toilet. Yet probable cause to believe that any inanimate object -- regardless of the possibility that it might be destroyed upon an arrest entry -- is present within a dwelling does not, in itself justify a search of that dwelling. See Vale v. Louisiana, 399 U.S. 30 (1970). In addition to probable cause to believe that the thing to be seized is within the dwelling, there must be either a warrant, or facts from which the officers could reasonably infer that delay would result in the destruction of evidence. See Preston v. United States, 376 U.S. 364 (1964). Neither was present in this case.

19/ Mrs. Browder denied having participated in such a conversation. (App. 151.)

6. The Director's parade of horribles which, it is asserted, would result from application of the warrant clause to dwelling searches made to seize persons (Resp. Br. 24) is unconvincing. The "'mini pre-arrest hearing' to determine whether warrantless entry is permissible" consists of nothing more than the ex parte decisions which are now made by a law enforcement officer whenever a warrantless search or seizure is undertaken. The need for a post-deprivation judicial determination of the reasonableness of the officer's warrantless actions -- which the Director apparently views as a frivolous luxury -- is necessary to preserve "one of the most fundamental distinctions between our form of government, where officers act under the law, and the police state, where they are the law." Johnson v. United States, 333 U.S. 10, 17 (1948). See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 678-80 (1974). Whenever, as in this case, there is no exigency, the officers may avoid the parade of horribles envisoned by the Director by simply applying for a warrant. This is a salutary course of action even when a warrant is not constitutionally required, see Watson v. United States, 423 U.S. 411, 456 n. 22 (1976) (Marshall, J., dissenting), and, if followed in this case, would likely have deterred the police misconduct.

7. The question of whether the alternatives to the warrant clause suggested by the Director (Resp.Br. 25) would be sufficient to satisfy the demands of the Fourth Amendment is not presented in this case, where the police did not have probable cause to arrest any one, specific person, where the seizure of all teen-age black males found within the Browder residence two days after an offense had been committed was not "reasonable," and where there was no attempt to comply with the state prompt arraignment rule. Nor can there be any "strategic incentives for police to obtain warrants where possible" (Resp. Br. 25), when, as here, the State Attorney General vigorously defends the reasonableness of a dragnet arrest, made at night from a dwelling, in the absence of any exigency, and without a search warrant.

8. The Director's claim that the police entry to the Browder residence was consented to by Mrs. Browder (Resp.Br. 26) should have been raised in the district court, when the Director had two opportunities to show that petitioner had been lawfully arrested. The Director cannot claim lack of notice of the warrant issue -- petitioner's application for a writ of habeas corpus asserted that his arrest was unlawful because it "was made without probable cause, without a warrant, and in the absence of exigent circumstances." (Petition, ¶13 (App. 5).)

It is conceivable that the Director has defended this case on the assumption that no court would hold petitioner's arrest unlawful because it was made without a warrant. But as in Whiteley v. Warden, 401 U.S. 560, 569 (1971), this would not justify a remand to the district court so that the Director may attempt to show that there was a voluntary consent to the police entry . This is especially true when, viewed in the light most favorable to petitioner, the evidence shows mere acquiescence to authority, rather than voluntary consent.[20] See Amos v. United States, 255 U.S. 313 (1921); Bumper v. North Carolina, 391 U.S. 543 (1968).

V. HABEAS CORPUS RELIEF IS PRECLUDED BY NEITHER STONE V. POWELL, 428 U.S. 465 NOR BY WAINWRIGHT V. SYKES, ___ U.S. ___ (1977)

The Director argues that consideration of the merits of petitioner's Fourth Amendment claim is precluded by Stone v. Powell, 428 U.S. 465 (1976) and by Wainwright v. Sykes, ___ U.S. ___, 97 S.Ct. 2497 (1977).[21] In our view,

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20/ While the arresting officers claimed to have been invited into the Browder dwelling (App. 142), Mrs. Browder testified that the police, upon arrival, said that they had come for her sons, and when asked "What for?" had responded that they were taking the youths "down for questioning and they would bring them back." (App. 150.) Petitioner's trial testimony (App. 93) corroborated his mother's recollections of the police entry.

21/ The Director apparently concedes that, if its notice of appeal was untimely, the applicability of these cases need not be considered. See Pet.Br. 42 n. 43.

These two cases must be read together to insure that when, as here, a state fails to provide an indigent accused with a full and fair opportunity to raise and have adjudicated a Fourth Amendment claim -- either at trial, on direct appeal, or through state collateral remedies -- the doors of the federal district courts remain open to decide the merits of the federal claim.

1. The Director contends that a prisoner receives the "full and fair opportunity" required by Stone v. Powell whenever a state has provided a procedure in which motions to suppress evidence may be made. (Resp.Br. 38.) While this contention may be applicable to the totality of the New York procedures involved in Gates v. Henderson, ___ F.2d ___ (2d Cir. No. 76-2065, August 19, 1977) (in banc)[22/] it has no place in this case, which arises from the repeated refusal of the Illinois courts to either consider the merits of petitioner's Fourth Amendment claim, or allow him an opportunity to avoid the failure of his appointed trial counsel to have raised the Fourth Amendment claim at trial.

As petitioner's travail through the Illinois courts

22/ In Gates v. Henderson, the Second Circuit convened in banc, received additional evidence (slip op. 5383), and reversed the panel opinion, cited in Pet.Br. 47 n. 52. The case was apparently submitted without re-argument prior to this Court's decision in Wainwright v. Sykes, supra. See slip op. 5361. The concurring opinion of Judge Oakes (slip op. 5381-89) discussed Sykes, and is in accord with our analysis.

reveals, Illinois does not provide any procedure through which a prisoner may demonstrate "cause" and "prejudice" to escape the consequences of a procedural default committed by trial counsel which resulted in the non-assertion of a Fourth Amendment claim. See Pet.Br. 43 n. 44. Absent such procedures, there can never be "full and fair litigation" of a Fourth Amendment claim which is not raised at trial.

Use of mechanical waiver rules as applied by the Illinois courts was rejected in Henry v. Mississippi, 379 U.S. 443 (1965) and again in Wainwright v. Sykes, supra. Rather than a Draconian waiver rule that, regardless of excuse, all claims not raised at trial are irretrievably lost, the due process clause requires that federal courts adjudicate, under 28 U.S.C. §2254, constitutional claims of state prisoners for the first time upon a showing of "cause" and "prejudice." See Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L.Rev. 441, 455-57 (1963). The Director, however, would construe "cause" and "prejudice" to replicate the mechanical waiver rules applied by the Illinois courts. (Resp.Br. 29-37). This belated argument, see infra at 32-33, must be rejected.

2. The "cause" and "prejudice" standards of Wainwright v. Sykes, supra, are derived from Shotwell Mfg Co. v. United States, 371 U.S. 341 (1963),[22] where the Court held that there was insufficient cause under F.R.Cr.P. 12(b)(2) to allow a post-trial challenge to grand and petit jury arrays when the alleged illegalities had not resulted in the seating of any unqualified grand or petit juror. Id. at 363 n. 25. Under those circumstances, the Court held that the defendants had not been "prejudiced in any way by the alleged illegalities in the selection of juries." Id. at 363. In this case, however, petitioner was prejudiced because evidence obtained as the result of his unlawful arrest was used to secure his conviction.[23] See Peters v. Kiff, 407 U.S. 493, 508 (1972) (Burger, C.J., dissenting); Alderman v. United States, 394 U.S. 165, 173 (1969).

The Director argues that a person accused of a crime is not "actually prejudiced" when evidence obtained in violation of his Fourth Amendment rights is used to obtain his conviction and imprisonment. (Resp.Br. 34-37.) While this might be true when use of unlawfully obtained evidence results in only harmless error, see Fahy v. Connecticut, 375 U.S. 85, 94-95 (1963) (Harlan, J., dissenting), in this case, as the district court found (App. 117), it cannot be said that use of the fruits of petitioner's unlawful arrest resulted in harmless error. See Whiteley v. Warden, 401 U.S. 560, 569 n. 13 (1971).

3. We disagree with the Director's contention (Resp.Br. 31-33) that the present record fails to establish the "cause" required by Wainwright v. Sykes, supra.[24] When, as here, the record shows that a prisoner was represented by court appointed counsel, that counsel failed to raise a meritorious constitutional claim, and that assertion of that claim would have emasculated the prosecution's case, a prisoner has made out a prima facie case of "cause." As in any other lawsuit, once the proponent has made out a prima facie case, the burden of coming forward with evidence shifts to the opposing party. See Hazelwood School District

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22/ Shotwell was applied in Davis v. United States, 411 U.S. 233 (1973) to preclude adjudication, absent a showing of "cause" and "prejudice," of claims of an unlawfully selected grand jury in a motion under 28 U.S.C. §2255 which could have been raised prior to trial. Davis was applied to jury discrimination claims raised by a state prisoner under 28 U.S.C. §2254, but not previously adjudicated in state court proceedings, in Francis v. Henderson, 425 U.S. 536 (1976). Wainwright v. Sykes, supra, applied Francis to all constitutional claims raised by a habeas petitioner which had not been adjudicated in the state courts.

23/ The Director had abandoned the claim, raised in the court below, that petitioner's alleged oral confession was free of any taint flowing from the arrest. See Appellant's Brief, 7th Cir., No. 76-1089, at 11-13.

24/ This is not to say that a stronger showing of "cause" would not have been made had the Director raised this issue in the district court when the waiver question was at issue. For example, we would have proved that trial counsel would only file pre-trial motions for which mimeographed forms had been prepared by the Public Defender's office, and that no form had been prepared to suppress the fruits of a warrantless arrest. We would have also have sought to show that, as in other cases, trial counsel was reluctant to present a vigorous defense lest he antagonize the trial judge, and thereby lose his coveted position as a trial assistant in the Public Defender's office.

v. United States, ___ U.S. ___, ___ 97 S.Ct. 2736, 2745 (1977) (Stevens, J., dissenting).

In the district court, where the waiver issue was considered under the standards of United States ex rel. Allum v. Twomey, 484 F.2d 734 (7th Cir. 1973) -- standards virtually identical to those adopted by this Court in Wainwright v. Sykes, supra -- the Director declined to come forward with any evidence to rebut the prima facie showing made out on the state trial record. On the contrary, the Director relied on the state court record as showing that, under United States ex rel. Allum v. Twomey, supra, "[c]ounsel made a reasonable choice not to challenge the legality of the arrest but to rely instead on the character of the evidence against petitioner." (Record Item No. 10, at 2.)

Having failed to exercise its opportunity to rebut petitioner's prima facie case in the district court, and after having acquiesced in the district court's finding of no waiver on appeal, the Director now asserts that petitioner has shown insufficient "cause" to excuse the failure of his court appointed trial attorney to have raised the Fourth Amendment issue at trial. This litigation strategy is identical to the "sandbagging" feared by the Court in Sykes, at ___, 97 S.Ct. at 2508, and should not be countenanced. The Court should therefore decline to

consider this belated claim of waiver. See Adickes v. Kress, 398 U.S. 144, 147 n. 2 (1970); Whiteley v. Warden, 401 U.S. 560, 569 (1971).

4. The Director attempts to defend the failure of petitioner's appointed trial counsel to have raised the Fourth Amendment claim as reasonable "in light of the status of the law in Illinois at the time." (Resp.Br. 32.) Petitioner's trial commenced in 1971, however, two years after this Court's decision in Davis v. Mississippi, 394 U.S. 721 (1969), and four years after the President's Commission on Law Enforcement and the Administration of Justice had concluded that "there is no legal basis for arresting persons simply as a means of detaining them while an investigation of their possible involvement in a crime is conducted. Ibid, Task Force Report: The Police 186 (1967). The Illinois Supreme Court had long prior to petitioner's trial adopted a generous intepretation of the "fruit of the poisonous tree doctrine," People v. Albea, 2 Ill.2d 317, 118 N.E.2d 277 (1954), and it simply cannot be said that it was "reasonable" for appointed trial counsel to withhold petitioner's Fourth Amendment claim. In addition, as Justice (then Judge) Stevens concluded in Nickols v. Gagnon, 454 F.2d 467 (7th Cir. 1971), counsel has a duty to raise "points which may ultimately support a federal constitutional claim even though foreclosed as a matter of state law." Id. at 483.

[to be inserted at the top of page 35]

5. The Director's reliance (Resp.Br. 33) on petitioner's failure to have asserted a Sixth Amendment claim in federal proceedings is misplaced. First, as Tollett v. Henderson, 411 U.S. 258 (1973) teaches, a different standard of incompetency is required to show a deprivation of Sixth Amendment rights than to allow adjudication of a constitutional claim not asserted in state court proceedings. Second, there is no reasonable inference which arises from petitioner's failure to have included a Sixth Amendment claim in his habeas petition: At the time proceedings were commenced in federal court, petitioner had not clearly exhausted state remedies on this issue. See United States

ex rel. Bonner v. Warden, 422 F.Supp. 11 (N.D.Ill. 1976), aff'd 553 F.2d 1091 (7th Cir. 1977). Amending the petition after this issue had been exhausted would only have protracted the already delayed adjudication of the Fourth Amendment issue. Finally, the Director's reliance (Resp. Br. 39 n. 16) on footnote six in LiPuma v. Commissioner, ___ F.2d ___ (No. 77-2006, 2d Cir., July 11, 1977) for the proposition that Stone v. Powell, 428 U.S. 465 (1976) requires that the failure of counsel to have raised a Fourth Amendment claim be excluded from review of counsel's competency, must be considered in light of the "farce and mockery" standard extant in the Second Circuit. See Rickenbacker v. Warden, 550 F.2d 62 (2d Cir. 1976). A different result would be reached under the more modern standards followed in the majority of the courts of appeals.[25/]

6. The Director's primary response to our argument (Pet.Br. 47-50) that Stone v. Powell, supra, should not be extended to a case involving egregious police misconduct is to repeat its contention that the blatantly investigative arrests in this case were reasonable. (Resp. Br. 41.) The Director also relies on the fact that the

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25/ See, e.g., United States v. DeCoster, 497 F.2d 1197 (D.C. Cir. 1973); Moore v. United States, 432 F.2d 730 (3d Cir. 1970) (in banc); Marzullo v. Maryland, ___ F.2d ___ (No. 76-1946, 4th Cir., September 2, 1977); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); United States ex rel. Williams v. Twomey, 510 F.2d 635 (7th Cir. 1975); United States v. Easter, 539 F.2d 663 (8th Cir. 1976); United States v. Rivas, 3 M.J. 282 (C.M.A. 1977).

court of appeals held the arrest to be lawful, but, as we have previously demonstrated, this conclusion was incorrect, and was based on an improper view of the facts. Finally, in further support of the need for habeas corpus review of Fourth Amendment questions involving egregious police misconduct, where the state courts have misconceived the federal rights involved, we note the recent observation of Mr. Chief Justice Burger:

> This Court cannot, of course, give plenary consideration to every erroneous holding, and I have no doubt that limitations of time and a crowded docket weigh heavily in the decision denying review. New York v. Earl, ___ U.S. ___, ___, 97 S.Ct. 2663, 2666 (1977) (Burger, C.J., dissenting from denial of cert.)

For all of these reasons, assuming that the Court chooses not to reverse on the jurisdictional question, neither Stone v. Powell, supra, nor Wainwright v. Sykes, supra, would preclude relief on the Fourth Amendment issues presented in this case.

Conclusion

For the reasons above stated, petitioner reiterates his request that the decision of the court of appeals be reversed, and the case remanded to the district court with instructions to reinstate its writ of habeas corpus. In the alternative, the case should be remanded to the district court for resolution of disputed questions of fact resolved in the first instance by the court of appeals.

In addition, the court of appeals should be directed to release its decision in this case for publication free of any restrictions on citation.

Respectfully submitted,

Kenneth N. Flaxman

5549 North Clark Street
Chicago, Illinois 60640
(312) 728-3525

Attorney for Petitioner

Of Counsel:

John T. Moran
John M. Kalnins
Thomas R. Meites

October, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5325

BEN EARL BROWDER,

Petitioner,

vs.

DIRECTOR, DEPARTMENT OF CORRECTIONS, STATE OF ILLINOIS,

Respondent.

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, ILLINOIS DIVISION, AS AMICUS CURIAE

SAMUEL FIFER
JAMES A. KLENK
200 East Randolph Drive
Suite 5900
Chicago, Illinois 60601
(312) 861-2000

ROLF NILS OLSEN, JR.
E. F. Mandel Legal Aid Clinic
6020 South University Avenue
Chicago, Illinois 60637
(312) 324-5181

Of Counsel:

DAVID GOLDBERGER
American Civil Liberties Union
Illinois Division
Five South Wabash Avenue
Chicago, Illinois 60603
(312) 726-6180

JOEL GORA
American Civil Liberties Union Foundation, Inc.
22 East 40th Street
New York, New York 10016
(212) 725-1222

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, ILLINOIS DIVISION, AS AMICUS CURIAE

May It Please the Court:

The American Civil Liberties Union, Illinois Division, respectfully submits this brief *amicus curiae*. All of the parties to the cause, through their counsel, have consented to this filing; their written consents have been filed with the Clerk pursuant to Rule 42.

ISSUE ADDRESSED BY AMICUS

Whether *Stone v. Powell*, 428 U.S. 465 (1976) and 28 U.S.C. § 2243 require federal habeas corpus courts to hear and determine the merits of a state prisoner's Fourth Amendment claim which has never been considered on the merits in the state courts due to an inadvertent failure to present the claim at trial.

INTEREST OF THE AMICUS

The American Civil Liberties Union, Illinois Division, is a non-partisan organization, of approximately 9,000 members, from the State of Illinois. The Union is dedicated solely to the protection of the Bill of Rights. Federal habeas corpus is a critical vehicle for the protection and vindication of these fundamental liberties. The issues in the present case concern the Fourth Amendment right of citizens to be free from unreasonable searches and seizures and the scope of relief on federal habeas corpus review. This brief is intended to assist in the resolution of those issues.

STATEMENT OF THE CASE

The Illinois courts refused to hear Ben Earl Browder's unlawful arrest claim. But the District Court below held, first on the trial record and then after hearing the testimony of the arresting officers, that Browder had been arrested without probable cause, that the "fruits" of this unlawful arrest were tainted, and that the admission of the tainted evidence at Browder's trial was constitutional error. Browder along with three other Black youths had been arrested without warrants for purposes of investigation and viewing in a police line-up. This warrantless "investigatory arrest," the Court found, contravened the Fourth Amendment.

The District Court held that Browder's Fourth Amendment claim was cognizable on federal habeas corpus. At his state trial, Browder's court-appointed counsel failed to raise this claim. On direct appeal, Browder presented the claim, but the Illinois appellate court refused to consider it on the ground that Browder's lawyer's failure to raise it waived the claim. The Illinois courts then refused to consider petitioner's unlawful arrest claim in post conviction proceedings, holding that the Illinois appellate court had "considered" the claim on direct appeal and that *res judicata* barred collateral review. The District Court found that there was no tactical reason for Browder's trial counsel's failure of advocacy and that under *Fay v. Noia*, 372 U.S. 391 (1963), this inadvertent procedural default would not bar plenary consideration of his claim.

The Seventh Circuit reversed in an unpublished opinion. The Court of Appeals did not set aside as clearly erroneous any factual findings of the District Court, but disagreed with the lower court's conclusion that

Browder's warrantless arrest was without probable cause.

Browder's certiorari petition succinctly demonstrates that the Seventh Circuit's decision is a marked departure from this Court's Fourth Amendment decisions. Browder and three other Black teenagers were arrested at Browder's home without a warrant "to see which one would be identified" at a police line-up. Such warrantless invasions of the home for investigatory detention have been soundly and repeatedly condemned by this Court. *See Davis v. Mississippi*, 394 U.S. 721 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1967). Amicus is fully in accord with petitioner's view of the Constitution and urges that the judgment of the Seventh Circuit be reversed.

Amicus addresses the following argument solely to the question of whether "federal relief to vindicate [Browder's] unlawful arrest claim would be precluded by *Stone v. Powell.*"[1] (Cert. Pet. at 2) Amicus submits that federal courts have the power and the duty to hear and determine Fourth Amendment claims, such as Browder's, which have never been considered on the merits in state courts.

[1] Two courts of appeal have considered this issue after this Court's decision in *Stone v. Powell* and reached different conclusions. The Second Circuit has held that claims such as Browder's are cognizable upon an application for federal habeas relief, *Gates v. Henderson*, 45 U.S.L.W. 2375 (2d Cir. 1977), and the Fifth Circuit has held that *Stone* forecloses federal collateral review of such Fourth Amendment claims, *O'Berry v. Wainwright*, 546 F.2d 1204 (5th Cir. 1977).

ARGUMENT

I.

Stone v. Powell Requires Federal Courts to Hear and Determine Browder's Fourth Amendment Claim on the Merits.

Stone v. Powell, 428 U.S. 465 (1976) holds that "a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of the claim at trial and on direct review." 428 U.S. at 495. In *Stone* the petitioners had raised and fully litigated and relitigated their Fourth Amendment claims on the merits throughout the state courts. In the instant case, Ben Earl Browder, through the inadvertence of his court-appointed trial attorney, was barred from litigating the merits of his unlawful arrest claim despite his repeated attempts to do so. The Court's analysis in *Stone* requires that Browder's constitutional claim be heard and determined by the federal courts.

Stone v. Powell reiterated that habeas corpus is a statutory remedy. 428 U.S. at 494-95, n. 37. This Court has long recognized that Congress establishes and defines the circumstances under which habeas relief will issue. *E.g., Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); *Ex Parte Dorr*, 44 U.S. (3 How.) 103 (1845). Since 1867 Congress has provided that federal courts must hear and determine the federal constitutional claims of citizens in custody pursuant to state court judgments. Act of February 5, 1867, 14 Stat. 385. The United States Code now provides that federal courts must "summarily hear and determine the facts" of such claims "and dispose of the matter as law and justice

require." 28 U.S.C. § 2243. This statutory scheme codifies the signal importance of the writ of habeas corpus to a democratic society.

Stone considered the application of the Fourth Amendment remedy of exclusion of evidence in the context of the clear congressional command that claims of unconstitutional confinement of state prisoners must be heard. *Stone* noted that Fourth Amendment claims frequently do not relate to the guilt or innocence of the accused and that application of the exclusionary remedy foreclosed the consideration of typically probative evidence. 428 U.S. at 490. Congress, however, has never limited the protections of the Great Writ only to those whose pleas of unconstitutional confinement related to the integrity of the fact-finding process. *Stone* did not, and could not, so rule. *Chessman v. Teets*, 354 U.S. 156, 165 (1957) (Opinion of Harlan, J.) *See Brewer v. Williams*, 45 U.S.L.W. 4287 (U.S., March 23, 1977).

Rather, *Stone* was concerned with the societal costs of federal relitigation of Fourth Amendment claims after full consideration had been afforded by the state judiciary. Accommodating the jurisdictional imperative of 28 U.S.C. § 2241 with these costs, *Stone* concluded that the exclusionary remedy should not be applied to such claims on federal habeas corpus when those claims have been fully and fairly litigated on the merits before the state courts.

Stone was predicated on principles of equitable restraint, not on the view that federal habeas courts have no jurisdiction to hear Fourth Amendment claims. 428 U.S. at 494-95. Citing Mr. Justice Powell's concurrence in *Schneckloth v. Bustamonte*, 412 U.S. 218, 250-75 (1973), *Stone* identified the suspension of finality in criminal trials and the exacerbation of friction between federal and state systems of justice as the primary costs occasioned by the relitigation of constitutional claims on federal collateral review.[2] With respect to claims that have been heard and determined on the merits at all levels of state judicial process, these systemic costs are not insubstantial.

Measured against those costs, *Stone* found only limited benefit to federal habeas relitigation of Fourth Amendment claims that had been fully aired in state courts. The primary purpose of the Fourth Amendment remedy of exclusion is deterrence of official misconduct in derogation of the constitutional right. While reaffirming the continued vitality of the exclusionary rule, *Stone* concluded that this purpose is best effectuated by application of the remedy at state trial and appellate proceedings. 428 U.S. at 439. The possibility of federal reversal of claims previously rejected by the state courts would not significantly enhance the disincentive already present from the risk of state exclusion. Accordingly, *Stone* held that the costs of relitigation of Fourth Amendment exclusionary remedy claims, after rejection of those claims on their merits by all levels of the state judicial process, exceeded the benefits to be derived from such reconsideration.

Consistent with the congressional mandate that constitutional claims be heard, *Stone's* analysis compels the conclusion that Ben Earl Browder's unlawful arrest claim be given plenary federal consideration. Here, the

[2] *Stone* identified as an additional cost of relitigation intrusion upon "the most effective utilization of limited judicial resources." 428 U.S. at 491, n. 31. But federal habeas consideration of the constitutional claims of state prisoners necessarily involves some strain on "limited judicial resources" by requiring consideration of identical claims by both state and federal judicial systems. In the instant case, because the state court system never considered the merits of the claim presently before the federal court, any strain upon judicial resources is minimal at most.

benefits of a first-time determination of Browder's claim override the perceived systemic costs. Such first-time litigation merely incurs the incidental costs that are inherent in any system of federal collateral review of state convictions and is imperative lest Browder's Fourth Amendment right be unredressed.

Concerns of finality of criminal judgments, for example, are not compelling where, as here, such claims have never been presented or decided on their merits. Implicit in the very concept of collateral review is the suspension of the finality of a judgment. For this reason this Court has held that "conventional notions of finality of litigation" have no place in habeas corpus proceedings, *Sanders v. United States*, 373 U.S. 1, 8 (1963), and Congress has expressly limited the application of *res judicata* in such cases. 28 U.S.C. §§ 2244, 2254. H.R. Rep. No. 1892, 89th Cong., 2d Sess. 7-9 (1966).

Federal habeas jurisdiction represents a mandate by Congress to the federal courts to test the constitutional legality of state-imposed deprivations of liberty. After claims of unconstitutional deprivation have been presented, passed upon, and reviewed on the merits, at some point society's interest in terminating all collateral attacks and insuring certainty of punishment and rehabilitation may require preclusion of further habeas consideration as a matter of equitable restraint. *See generally* Bator, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 Harv. L. Rev. 441 (1963). *Stone* suggests that, in the context of Fourth Amendment claims, this point is reached only after these claims have been fully considered at least once on their merits. But, to completely foreclose any consideration of Browder's constitutional claim in favor of putting an end to litigation exalts finality over the congressional purposes of habeas.

Similarly, the concerns of federalism found persuasive in *Stone* do not apply here. *Stone* was concerned with the "humiliating" reconsideration by federal district courts of a state court ruling on the merits of a constitutional claim. *Schneckloth v. Bustamonte*, 412 U.S. 250, 264 (1973) (Powell, J., concurring). The instant case simply does not present such a situation. Browder's federal constitutional deprivation has never, at any level, been considered or addressed by the courts of Illinois. Indeed, at every opportunity the Illinois courts refused to take such action. Thus, there is no "humiliating" reexamination of a considered state court ruling on the merits in this case.

The only relevant federalism concern here is that the availability of federal collateral relief not encourage intentional, strategic bypass of state courts as a forum for constitutional adjudication. This Court's decision in *Fay v. Noia*, 372 U.S. 391 (1963), however, satisfies this concern by providing that federal courts will not, as a matter of equitable discretion, consider federal claims that were intentionally or tactically bypassed in the state courts. Inadvertent procedural defaults, such as that of Browder's court-appointed counsel, are not likely to be deterred by penalizing the convicted defendant. The refusal of federal courts to consider grave constitutional deprivations due to such defaults would in no way further adherence to established rules of state procedure. *See* Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1350-52 (1961).

Measured against these costs—which are minimal and clearly within the contemplation of Congress—the benefits accruing from the Fourth Amendment remedy in cases such as Browder's predominate. In this case, federal application of the exclusionary rule is necessary

to vindicate Browder's constitutional rights. In *Stone*, the constitutional claims were vindicated by being presented and fully considered at all levels of the state proceeding. To deny Browder access to the federal habeas forum is to leave the injury to his Fourth Amendment right without a remedy.[3]

Since the deterrence that justifies the exclusionary rule is systemic, not individual, the deterrence benefits here are significantly greater than in *Stone*. As set forth by Professor Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U.Chi. L. Rev. 665, 709-11 (1970):

> "The exclusionary rule is not aimed at special deterrence since it does not impose any direct punishment on a law enforcement official who has broken the rule . . . . The exclusionary rule is aimed at affecting the wider audience of law enforcement officials and society at large. It is meant to discourage violations by individuals who have never experienced any sanction for them.
>
> * * *
>
> As a visible expression of social disapproval for the violation of these guarantees, the exclusionary rule makes the guarantees of the fourth amendment credible. Its example teaches the importance attached to observing them."

[3] The possibility of providing Browder with an alternative remedy under the Sixth Amendment may be more apparent than real. Sixth Amendment claims do not focus on the merits of the independent Fourth Amendment violation waived by counsel at trial but rather focus on the overall competency of counsel's representation. The standards of constitutional scrutiny and the constitutional concerns at issue are entirely different. *Compare Beck v. Ohio*, 379 U.S. 89 (1964) *with United States ex rel. Williams v. Twomey*, 510 F.2d 634 (7th Cir.), *cert. denied, sub nom.* 423 U.S. 876 (1975). Thus, an entire class of Fourth Amendment claims may never be vindicated in the Sixth Amendment context—a result wholly at odds with the intent of Congress. *See Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1040, 1112 (1970).

Thus the deterrence of Fourth Amendment violations depends not so much on the application of sanctions as on the simple certainty that the constitutionality of the law enforcement official's actions will be scrutinized at least once by a court of law.

Permitting federal determination of Fourth Amendment claims inadvertently not presented to the state courts is thus the only accommodation of the purposes of the exclusionary rule and the policies of *Stone*. It insures that all not-intentionally waived Fourth Amendment claims will be resolved on their merits by a court of law; but, consonant with the concern that such claims not be indefinitely relitigable, these claims will still only be heard and determined on the merits at least once. In terms of the *Stone* cost-benefit analysis, so long as the opportunity for constitutional vindication is limited to one level, the fact that the forum is federal rather than state is insignificant.

We submit therefore that Ben Earl Browder has been "denied an opportunity for a full and fair litigation" of his unlawful arrest claim and that federal habeas courts must hear and redress this violation of his Fourth Amendment rights.

II.

Congress Has Mandated That Federal Habeas Courts Must Hear And Determine Browder's Fourth Amendment Claim On Its Merits.

Stone v. Powell must be read to require first-time consideration of Browder's Fourth Amendment claim on the merits in federal habeas courts. This Court must insure that the habeas corpus jurisdiction conferred on the federal judiciary by Congress be respected. The congressional command that Browder's claim must be

heard flows not from his assertion that he is "in custody in violation of the Constitution," *Stone v. Powell*, 428 U.S. at 502 (Brennan, J., dissenting), but from the fact that his unlawful arrest claim has never been "heard and determined" on the merits. 28 U.S.C. § 2243. Depriving Browder, and all others similarly situated, of any opportunity to have their claims determined by at least one court of law would defeat the clear intent of Congress and abrogate the statutory protections.

Congress has entrusted the federal courts with the power and duty to be the final arbiter of the constitutional legality of state-imposed deprivations of liberty. *Brown v. Allen*, 344 U.S. 443, 500 (1953). By statute, the federal courts are required to "entertain an application for" and may grant writs of habeas corpus on "behalf of a person in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(c)(3), 2254(a). The court entertaining the application for relief must "summarily hear and determine the facts,' and "dispose of the matter as law and justice require." 28 U.S.C. § 2243. "Simply because [unconstitutional detention] is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed." *Townsend v. Sain*, 372 U.S. 293, 312 (1963). If Congress has gone to such lengths to permit the relitigation of claims on the merits two or more times, the policy of Congress is *a fortiori* plainly to insure at least one full and fair litigation of constitutional claims.

This Court's decisions in *Townsend v. Sain*, 372 U.S. 293 (1963), and *Fay v. Noia*, 372 U.S. 391 (1963), confirm the controlling congressional direction that Browder's Fourth Amendment claim must be heard and determined on the merits. *Townsend* construed Section

2243's command that facts must be heard and determined. 28 U.S.C. § 2243. *Townsend* held that federal district courts must conduct evidentiary hearings and resolve the constitutional claims of state prisoners in all cases in which the habeas applicant did not receive a full and fair evidentiary hearing in a state court. 372 U.S. at 312-13. Thus federal courts must "hear and determine" a constitutional claim if "*for any reason not attributable to the inexcusable neglect of the petitioner* . . . evidence crucial to the adequate consideration of the constitutional claim was not developed" at a state court hearing. 372 U.S. at 317 (emphasis supplied). Browder's claim falls directly into this category and therefore must be considered and resolved on its merits.

Fay v. Noia held that state procedural defaults, like the inadvertent default of Browder's attorney here, do not deprive the federal courts of jurisdiction to grant habeas corpus relief to citizens in custody pursuant to state court judgments. *Fay* squarely rejected the notion that such defaults are independent and adequate state grounds that bar plenary resolution of federal constitutional claims. This result, the Court held, was compelled by Congress' decision to confer federal jurisdiction to hear such challenges and by the fundamental importance of habeas corpus to challenge violations of constitutional rights. 372 U.S. at 426-35. *Accord Lefkowitz v. Newsome*, 420 U.S. 283, 292 (1975); *Humphrey v. Cady*, 405 U.S. 504 (1972).

Fay did not hold, however, that all federal constitutional claims are cognizable in federal habeas courts. Thus, as a matter of equitable restraint federal courts will not entertain the plea of a defendant who has deliberately abused a state process, 372 U.S. at 438, or has slept on a constitutional right that can be cured,

Francis v. Henderson, 425 U.S. 536 (1976). Such restraint will not justify a refusal to consider Browder's claim. Browder did not waive his federal right to relief for tactical advantage nor is his illegal arrest a constitutional violation that is capable of cure within the trial process.

Congress ratified *Townsend* and *Fay* when it revised the habeas corpus statutes in 1966. Responding to those decisions, Congress rejected attempts to "take away from the federal courts all jurisdiction over habeas corpus to review state court action." H.R. Report No. 1892, 89th Cong. 2d Sess. 4-7 (1966). No action was taken to exclude from federal jurisdiction those claims that would be barred by the adequate state ground doctrine on direct review. Rather, Congress provided only for the qualified application of *res judicata* to claims that had once been presented to a federal court and spelled out those circumstances in which a state court's findings of fact after a hearing on the merits will be presumed correct. Act of November 22, 1966, Pub. L. No. 89-711, 80 Stat. 1104 *amending* 28 U.S.C. §§ 2244, 2254. Thus, Congress adopted *Townsend* and *Fay*'s well-reasoned construction of the habeas statutes. *See Georgia v. United States*, 411 U.S. 526, 533 (1973); *Shapiro v. United States*, 335 U.S. 1 (1948).

Stone v. Powell accordingly must be read to require federal habeas consideration of the merits of Browder's Fourth Amendment claim. *Stone* holds that state prisoners may not raise Fourth Amendment claims "absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review." 428 U.S. at 494-95. It is difficult to conceive of a clearer instance of a habeas petitioner being "denied an opportunity" to present a Fourth Amendment claim to the state courts than the

instant case in which counsel's inadvertent failure to raise the claim at trial, coupled with the restrictive Illinois "waiver/res judicata" rule, totally foreclosed any consideration whatsoever. *Townsend v. Sain*, 372 U.S. 293, 317 (1963).

More importantly, to bar the federal courthouse door to Browder would insure that no Fourth Amendment claim would ever be heard on federal habeas. If Browder has not been denied an "opportunity for a full and fair" state-court litigation of his claim, then such an opportunity would only be denied when a state court intentionally refused to *ever* consider Fourth Amendment claims, even when those claims have been properly preserved. This abuse of state judicial power presents a Fourteenth Amendment deprivation of due process of law wholly independent of the Fourth Amendment claim. In such a case, there is no cause to reach the Fourth Amendment issue. *United States ex rel. Petillo v. New Jersey*, 400 F.Supp. 1152, 1188 (D.N.J. 1975), *as supplemented*, 418 F.Supp. 686 (D.N.J. 1976) (habeas petitioners denied due process of law when state court refused to hear Fourth Amendment claims). Thus Fourth Amendment violations would no longer be cognizable on federal habeas. Such a result diametrically conflicts with the federal courts' responsibility under their habeas jurisdiction to "hear and determine" federal constitutional claims, and cannot be justified by any view of equitable restraint.

We submit therefore that to ignore the teachings of established decisional law and hold that Browder has forfeited his right to plenary federal consideration of his Fourth Amendment claim "would be in disregard of what Congress has expressly required." *Brown v. Allen*, 344 U.S. 443, 509-10 (1953) (Opinion of Frankfurter, J.).

CONCLUSION

For the foregoing reasons, this Court should consider the merits of Ben Earl Browder's Fourth Amendment claim as mandated by Congress. Amicus joins petitioner in urging that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

SAMUEL FIFER
JAMES A. KLENK
200 East Randolph Drive
Suite 5900
Chicago, Illinois 60601
(312) 861-2000

ROLF NILS OLSEN, JR.
E. F. Mandel Legal Aid Clinic
6020 South University Avenue
Chicago, Illinois 60637
(312) 324-5181

Of Counsel:

DAVID GOLDBERGER
American Civil Liberties Union
Illinois Division
Five South Wabash Avenue
Chicago, Illinois 60603
(312) 726-6180

JOEL GORA
American Civil Liberties Union Foundation, Inc.
22 East 40th Street
New York, New York 10016
(212) 725-1222

No. 76-5325

In the Supreme Court of the United States

BEN EARL BROWDER,

Petitioner,

vs.

DIRECTOR, DEPARTMENT OF CORRECTIONS, STATE OF ILLINOIS,

Respondent.

BRIEF AMICUS CURIAE OF THE CHICAGO COUNCIL OF LAWYERS

HOWARD EGLIT
77 South Wacker Drive
Room 312
Chicago, Illinois 60606
312/567-5000

DOUGLASS CASSEL, JR.
109 North Dearborn
Chicago, Illinois
312/641-5570

JOHN CHRISTIE, JR., President
Chicago Council of Lawyers
53 West Jackson Boulevard
Chicago, Illinois
312/427-0710

Attorneys for Amicus Curiae Chicago Council of Lawyers

On the Brief:
Steven Barkin
77 South Wacker Drive
Chicago, Illinois 60606
312/567-5000

ORAL ARGUMENT REQUESTED

SORG/CHICAGO U.S.A.

TABLE OF AUTHORITIES

Cases

Other Authorities

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BRIEF AMICUS CURIAE OF THE CHICAGO COUNCIL OF LAWYERS

INTEREST OF AMICUS CURIAE

The Chicago Council of Lawyers is an association of approximately 1,200 attorneys in Chicago. The Council's principal concern is the improvement of the administration of justice, both in the federal and the state courts. In accordance with this concern, the Council has addressed itself to such matters as Local Rule 22 of the Northern District of Illinois federal district court, and to the federal district court rules regulating comment by attorneys. See, e.g., *Chicago Council of Lawyers* v. *Bauer,* 522 F.2d 242 (7th Cir. 1975), cert. denied sub nom. *Cunningham* v. *Chicago Council of Lawyers,* 96 S.Ct. 3201 (1976).

The Council's interest in this case relates to petitioner's challenge to Circuit Rule 35 of the United States Court of Appeals for the Seventh Circuit, entitled "Plan for Publication of Opinions of the Seventh Circuit." The Council is concerned that this Rule raises serious jurisprudential and constitutional questions, as amicus discusses *infra*. We believe these questions deserve the fullest consideration by this Court, and thus have filed this brief amicus curiae.*

STATEMENT OF FACTS

The parties have set forth the underlying facts and procedural history of this case in their respective briefs. For purposes of this brief amicus curiae we summarize only those points relevant to Circuit Rule 35, the Plan for Publication of Opinions of the Seventh Circuit, set out fully in the appendix to petitioner's petition. Pet. for Cert., A53.

The district court granted petitioner's request for a writ of habeas corpus, and later denied respondent's motion to reconsider, in two unpublished opinions. Pet. for Cert., A3-16, A26. The Court of Appeals for the Seventh Circuit reversed, in a seven page typed decision. Pet. for Cert., A30-36. Despite a number of indicia of precedential value,[1]

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* Both petitioner and respondent have consented to the filing of this brief.

[1] These include the reversal of the district court, the substantial Fourth Amendment issue raised by the case, the absence of any direct precedent from the Seventh Circuit, the arguable conflict between the decision and precedent in several other jurisdictions, Pet. for Cert., at 20 nn. 25, 26, and the arguable resolution of an issue explicitly left open by a prior decision of this Court. Pet. for Cert., at 20.

the Court of Appeals determined under Circuit Rule 35 to issue this ruling as an unpublished "order" rather than as a published "opinion." The order is recorded in the table of unpublished rulings at 534 F.2d 33 (7th Cir. 1976). The Court of Appeals also denied rehearing without opinion. Pet. for Cert., A37.

Invoking the provision of Circuit Rule 35 permitting "any person" to so move, petitioner timely moved for issuance of the Court of Appeals' decision as a published opinion.[2] The appellate court denied that motion without explanation. Pet for Cert., A38.

In his petition for a writ of certiorari, which has been granted in full by this Court, petitioner stated his fourth "question presented" as follows:

> May a United States Court of Appeals reverse a decision of a district court in an unpublished and non-citable opinion, when the case is not controlled by direct precedent, involves a substantial question pertaining to the protections of the Fourth Amendment, and where public notice of the decision might encourage Illinois to follow the lead of the American Law Institute and other states in enacting a statute to protect its citizenry from warrantless arrests for investigation?

Pet. for Cert., 3.

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[2] Petitioner's motion, filed June 28, 1976, argued that the case involved an issue of continuing importance; that police officers might rely on its disposition in regulating their future conduct despite non-publication of the "order;" that publication might alert state courts to fashion corrective procedures; that the case established a new rule of law, as the first case in the Circuit to consider an arrest of two persons to determine which, if either, should be charged; and that uniformity of decision required publication, since the order reversed a district court's decision, and another district judge in a similar case would likely reach the same result as his brother absent publication of the Court of Appeals' ruling.

SUMMARY OF ARGUMENT

The no-publication, no-citation Rule of the United States Court of Appeals for the Seventh Circuit works serious detriment to litigants, to jurisprudence, and to the Constitution. This Rule deserves full consideration by this Court in this case.

The genesis of the Rule lies in increasing judicial concern regarding the large amount of time necessitated by the preparing of, and writing of, publishable opinions. The Rule provides that certain decisions shall be issued by way of "orders," which are not publishable and are not to be cited to any court within the Seventh Circuit.

The detriments imposed by Rule 35 severely outweigh its claimed benefit of administrative convenience. These detriments are both non-constitutional, and constitutional, in nature. The non-constitutional vices of the Rule flow from a number of consequences of the Rule. First, the Rule imposes inequality upon litigants. Those litigants and attorneys located in Chicago have access to unpublished "orders," at least in terms of geography, whereas litigants living elsewhere, and litigants who are indigent or who are immobilized because of handicap or institutionalization, are disadvantaged in securing these "orders." Moreover, litigants and attorneys who regularly appear before the appellate court obtain a familiarity with unpublished "orders" denied to other parties who only occasionally, if even more than once, argue before the Court of Appeals. Moreover, inequality flows from the possibility that similarly situated litigants will be treated differently in terms of ultimate dispositions.

It is insufficient answer to respond that since the "orders" are not to be cited, they are not needed anyway. Indeed, such "orders" do have very significant impact upon litigants.

Second, Circuit Rule 35 impairs the decision-making process of the appellate court. By enabling the Court of Appeals to limit the application of legal doctrine to the facts of the particular appeal, the rigor of careful opinion-writing is lost, and thereby the 'rightness' of decision is jeopardized.

Third, the Rule, even though barring litigants from relying upon unpublished "orders," does not bar the Court of Appeals and the trial courts of the Seventh Circuit from so doing. And even if it did, the fact is that human nature, peer pressure, and the demands of institutional conformity would all militate against these courts in fact being able to totally disregard the existence of prior rulings of which they are aware, even if those rulings in theory are not precedential in import.

Fourth, the Rule fails to assure that all significant rulings are published. Indeed, numerous examples exist which demonstrate that in fact the Rule has failed as an adequate guideline for assessing the significance of decisions.

Fifth, the Rule impairs the ability of litigants to secure effective review in this Court. The very fact that a decision is unpublished is a signal that it is not 'important.' Moreover, the relaxation of the rigor of opinion-writing, leading to diminished discussion of the factual context of the case, impairs this Court's ability to assess the ruling below.

Finally, the Rule produces the appearance of injustice. Even though the Court of Appeals regards unpublished "orders" as non-precedential, the public in general, and

litigants in particular, still must regard the existence of rulings which are not published and which are not to be cited as creating the appearance of a selective system of secrecy, thereby mitigating the appearance of justice.

As a result of all these vices, Rule 35 should be abolished. And it can be—on non-constitutional grounds, as being in excess of the Court of Appeals' authority, as being in conflict with Rule 19 of this Court, and as being unreasonable. The supervisory power of this Court and 28 U.S.C. §2071 form the basis—each independent of the other—for this Court's striking down Rule 35.

Apart from non-constitutional defects of Rule 35, there is the separate problem that the rule very seriously impacts upon the First Amendment. It trenches upon the 'right to know,' and it constitutes an unjustified scheme of censorship. Moreover, the rule is fatally vague. Thus, the Rule must fail on First Amendment grounds.

Even if this Court should conclude that the Rule is not so defective—either on non-constitutional or constitutional grounds—as to warrant abolition, it nevertheless should be modified, pursuant to this Court's supervisory authority over the lower federal courts.

ARGUMENT

I.

INTRODUCTION

Petitioner, in challenging the application of Circuit Rule 35—the no-publication, no-citation rule of the United States Court of Appeals for the Seventh Circuit—has asked this Court to "review the burgeoning trend towards 'secret law' " in the United States Courts of Appeals. Pet. for Cert., at 22. His posing of the problem is far from the most dramatic which has been offered. One commentator, extolling the role of printed judicial decisions in Europe's emergence from "lawless tyranny," implies that no-publication rules may place us on the return path to the Dark Ages. Gardner, "Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?," 61 A.B.A.J. 1224, 1227 (1975).[3]

We do not think it necessary to sound the alarum of jurisprudential disaster to nonetheless reach the conclusion that Circuit Rule 35 works very serious detriment to litigants,

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[3] For other opposition to the no-publication, no-citation rule see Commission on Revision of the Federal Court Appellate System, Hearings—Second Phase 1974-1975, Vol. I, 1974 Hearings (hereinafter "Commission Hearings"), Testimony of Willard J. Lassers on behalf of the American Civil Liberties Union, Illinois Division and the Chicago Lawyers' Committee for Civil Rights Under Law (hereinafter "Lassers Testimony"), at 554-58; Commission Hearings, *supra*, Report on Seventh Circuit Court of Appeals Rule 28 by the Chicago Bar Association Committee on Federal Civil Procedure, at 612 et seq.; Report of the Chicago Bar Association Committee on Appellate Court Congestion and Procedure, Chi. Bar Rec. 16, 20-21 (July-Aug., 1974).

to jurisprudence, and to the Constitution. Amicus recognizes that the Rule was born of no such regressive intentions; that, however, does not diminish the actual effects of the Rule. Nor does the ostensibly innocuous purpose of the Rule—"to reduce the proliferation of published opinions," Rule 35, §(a)—mitigate its significant impact upon the business of the Seventh Circuit Court of Appeals. In 1973, its first year of operation,[4] the rule was employed to dispose of 62% of all appeals by unpublished "orders;" in 1974 the figure was 46%; and in the first ten months of 1975 47%.[5]

In this brief amicus will address both the no-publication aspect of Rule 35 and its no-citation corollary, embodied

[4] The predecessor to Rule 35—Rule 28, became effective on February 1, 1973. The Rule was amended as of July 1, 1976 so as to provide that "any person may move for publication of an unpublished order," and to further provide that decisions reversing published lower court rulings be themselves published. These changes are embodied in sections (d)(3) and (c)(1)(v), respectively, of Rule 35.

[5] Hastings, "The Seventh Circuit Plan for Publication of Opinions —A Continuing Experiment," 51 Ind. L. J. 366, at 371 (1976) (hereinafter "Hastings"). Reliance in 1973 on unpublished rulings in other Circuits ranged from 26% in the Eighth Circuit to 78% in the District of Columbia Circuit. Commission Hearings, *supra* note 3), Testimony of Edward H. Hickey, President, Bar Association of the Seventh Federal Circuit, at 451. Amicus would note that not only does the Seventh Circuit Court of Appeals hand down a considerable number of rulings by unpublished "orders;" the Court further does not even publish a statistical summary disclosing how many appeals are in fact terminated by "orders," as opposed to "opinions." See e.g., *The Judicial Business of the United States Courts of the Seventh Circuit—1976*, at 12, lumping together under the label "Appeals Terminated by Opinion" those appeals terminated both "by slip opinions and by Cir. Rule 35 'Unpublished Orders'."

in the same Rule.[6] Indeed, the two parts of the Rule are symbiotically bound together, both compelling analysis if any accurate and realistic conclusions are to be drawn.[7]

II.

THE GENESIS AND CONTENT OF CIRCUIT RULE 35.

Circuit Rule 35, providing for the non-publication and correlative non-citation of some rulings of the Court of Appeals for the Seventh Circuit, is the ultimate product of a generalized concern among the judiciary regarding the large expenditures of time required for researching and thence writing publishable opinions. The Committee on Use of Appellate Court Energies of the Advisory Council for Appellate Justice reported in 1973 that appellate court judges "ranked opinion-writing as the second most significant cause of delay in the highest appellate courts. . . ."[8] As a means of dealing with this problem, the

[6] This Court has just recently had before it the same Rule 35 for consideration, in *Do-Right Auto Sales* v. *The United States Court of Appeals for the Seventh Circuit*, ... U.S. ....., 97 S.Ct. 341 (1976). The Court of Appeals filed a responsive brief therein. This Court denied the petition.

[7] See e.g., Committee on Use of Appellate Court Energies of the Advisory Council on Appellate Justice, *Standards for Publication of Judicial Opinions*, FJC Research Series No. 73-2, State Courts Works-in-Progress Series, August, 1973, at 18-21 (hereinafter *"Publication Standards"*). See also Commission Hearings, *supra*, note 3, Testimony of Honorable Robert Sprecher, Judge, Seventh Circuit Court of Appeals, at 532 (hereinafter "Sprecher Testimony"): "I would think that if a no-citation rule did not go hand in hand with a no-publication rule, I would feel that we should do away with the no-publication rule and go back to the full publication rule. . . ."

[8] *Publication Standards, supra* note 7, at 1.

Committee recommended that "opinions be published only if certain defined standards for publication . . . (were) satisfied."[9] This non-publication of at least some rulings would, in the Committee's view, respond to a number of problems and, in so doing, produce a number of benefits:

a. Unlimited proliferation of published opinions constitutes a burden and a threat to a cohesive body of law. . . .

b. Publication of opinions burdens the work of writing opinions. While limitation on the publication of opinions does not reduce the number of opinions to be written, it greatly reduces the time and resources that must be devoted to opinion preparation. An opinion prepared to inform the parties of the reasons for a decision may properly be quite different from an opinion that will be published and become part of the body of precedent.

c. The burden on the lawyer is commensurate with that of the judge in terms of accountability in preparing his cases. The endless search for factual analogy requires immense expenditures of time and funds that can result in reliance upon quirks rather than upon careful rationalization and application of the developing law.

d. . . . Posting, maintenance, shelving and librarian services result in time and money costs disproportionate to the value of the materials.

e. The burden on the publishing industry to continue to supply a complete reporting services (sic) at prices that are tolerable appears to be beyond their capacity.

f. As the number of opinions grows, law-finding devices must proliferate and expand, and this is

[9] Id. at 4.

in itself a burden. If the finding devices do not grow, they become less effective, from loss of precision and sophistication.[10]

A necessary adjunct to the no-publication rule, the Committee concluded, was a no-citation rule. Here, too, the Committee provided a listing of the bases for its conclusion:

1. It is unfair to allow counsel, or others having special knowledge of an unpublished opinion, to use it if favorable and withhold it if unfavorable.

2. Cost will be reduced by eliminating the need to obtain and examine the mass of opinions that are not designated for publication.

3. The absence of a non-citation rule would encourage the inclusion in opinions not designated for publication of facts and details of reasoning, thus frustrating the purposes underlying non-publication.

4. Cost and delay of cases appealed only because they are apparently at odds with unpublished opinions can be reduced.

5. Great difficulty, if not impossibility, would be involved in determining whether an unpublished opinion has been overruled.[11]

Other movement towards a non-publication system also was afoot at about the same time as the Committee on Use of Appellate Court Energies was working. At its Spring, 1972 meeting the Judicial Conference of the United States addressed the question of publication, the Director of the Federal Judicial Center presenting a recommendation on the matter. The Conference referred the recommendation

[10] Id. at 7-8.

[11] Id. at 19.

to its Committee on Court Administration.[12] At its Fall, 1972 meeting the Conference "approved the circulation to all circuit judges of the detailed recommendations of the Board of the Federal Judicial Center concerning the publication of opinions of the courts of appeals," and "requested each circuit to develop an opinion publication plan by January 1, 1973."[13] The predecessor of Circuit Rule 35 followed.[14]

Circuit Rule 35, entitled "Plan for Publication of Opinions of the Seventh Circuit," sets out a scheme for the Court of Appeals' determination as to which of its decisions shall, and which shall not, be issued as publishable rulings. A number of criteria are provided to assist in the determination—those rulings which satisfy the criteria

[12] Report of the Proceedings of the Judicial Conference of the United States, April 6-7, 1972, at 3.

[13] Report of the Proceedings of the Judicial Conference of the United States, October 26-27, 1972, at 33.

[14] For further explication of the history of no-publication, no-citation rules in general, and the genesis of Circuit Rule 35 in particular, see Commission Hearings, *supra* note 3, Sprecher Testimony, *supra* note 7, at 519-39; Hastings, *supra* note 5. As of today, every Circuit has adopted a plan providing for the non-publication of some opinions. The statistical configuration is less uniform with regard to the non-citation aspects of these plans. The plans of the District of Columbia, First, Second, Sixth, Seventh, Eighth, and Ninth Circuits expressly forbid the citation of unpublished decisions. The Tenth Circuit allows citation of an unpublished opinion, but requires the citing party to serve a copy upon opposing counsel. The plans of the Third, Fourth, and Fifth Circuits are silent as to citation. The Fourth Circuit has stated, however, that it "prefers that . . . (its unpublished memorandum decisions) not be cited" to it and that it will not itself "in published opinions cite or refer to memorandum decisions." *Jones* v. *Superintendent, Virginia State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972).

are thence deemed "opinions;" rulings failing to pass muster are denominated "orders." Rule 35, §(b).[15]

[15] Rule 35 provides in relevant part:

(c) Guidelines for Method of Disposition.

(1) Published opinions: Shall be filed in signed or per curiam form in appeals which

(i) Establish a new or change an existing rule of law;

(ii) Involve an issue of continuing public interest;

(iii) Criticize or question existing law;

(iv) Constitute a significant and non-duplicative contribution to legal literature

(A) by a historical review of law;

(B) by describing legislative history; or

(C) by resolving or creating a conflict in the law; or

(v) Reverse a judgment or deny enforcement of an order when the lower court or agency has published an opinion supporting the order.

(2) Unpublished orders:

(i) May be filed after an oral statement of reasons has been given from the bench and may include only, or little more than, the judgment rendered in appeals which

(A) are frivolous or

(B) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where

(aa) a controlling statute or decision determines the appeal;

(bb) issues are factual only and judgment appealed from is supported by evidence;

(cc) order appealed from is non-appealable or this court lacks jurisdiction or appellant lacks standing to sue; or

(ii) May contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which

(A) are not frivolous but

(B) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

While both "opinions" and "orders" are available to the general public by request made of the Clerk of the Court, it is only the former which are published in the Federal Reporter system. The only reference to "orders" allowed, pursuant to Rule 35, §(b)(2)(iii), is their listing in the Federal Reporters' tables of decisions, recording simply affirmance or reversal. See e.g., 534 F.2d 330-31 (7th Cir. 1976).

As for citation, "orders" may not be cited except, as the Rule provides in Section (b)(2)(iv), "to support a claim of *res judicata,* collateral estoppel or law of the case. . . ." This ban on citation extends to all courts within the circuit, and to inclusion in both written documents and oral argument. Rule 35, §(b)(2)(iv).

III.

THE DETRIMENTS IMPOSED BY CIRCUIT RULE 35 SEVERELY OUTWEIGH ITS CLAIMED BENEFITS, AND THUS COMPEL THE RULE'S ABOLITION ON A NUMBER OF NON-CONSTITUTIONAL GROUNDS.

The primary basis for Rule 35 is administrative convenience—the policy underlying the rule is "to reduce the proliferation of published opinions." Rule 35, §(a). As a necessary link in the chain to making this policy effective, the Rule not only restricts those rulings which shall be published, but further imposes a ban on the citation of unpublished "orders."

We do not dispute that there is a serious problem arising from very large federal court caseloads—a problem which, in one aspect, takes the form of overburdening of federal court judges. Nor does amicus dispute the burden placed upon litigants confronted with a steadily growing body of case law to analyze and to thence use or discard, as the case may warrant.

Amicus does dispute any notion that might exist that the no-publication, no-citation rule imposes no costs. Indeed, amicus is firmly convinced that such costs do exist, and that indeed their severity mandates abolition of Rule 35.

While we view Circuit Rule 35 as raising very serious problems under the First Amendment, which we address in Section IV, *infra,* we first address the defects of a non-constitutional nature which Rule 35 embodies. These defects, both singly and in the aggregate, lead to the conclusion that Rule 35 should be abolished by this Court. This Court's authority to order such abolition is grounded on a number of bases—the Rule's exceeding the Court of Appeals' authority; Rule 35's potential conflict with Rule 19 of this Court; and Rule 35's being so damaging as to warrant the exercise of this Court's supervisory authority over the lower federal courts.

A. THE NO-PUBLICATION, NO-CITATION RULE IMPOSES UNEQUAL TREATMENT UPON LITIGANTS.

1. Disparity in Litigants' Access to Unpublished "Orders" Results in Unequal Treatment.

In theory, Rule 35 leaves all litigants in an equivalent posture. None of them may cite unpublished rulings; all of them may obtain these rulings. In practice, the Rule does not work out so neatly.

For the litigant in Chicago, the question of access to unpublished "orders" is one of finding the time and the means to come to the office of the Clerk of the Seventh Circuit Court of Appeals. He may there peruse the files, and select for reproduction at his expense those "orders"

which he finds of some utility. While the system is not a convenient one—given the need to go to the Clerk's office; given the need to pay for "orders" which, were they in a law library, he could use at his library desk free of charge; and given the lack of even the most basic research aid, e.g., a subject matter index—it is perhaps not intolerable.

The litigant located outside Chicago, or the immobilized litigant, stands in a different position. Ordinarily, he could simply consult the law books in the nearest local law library to research his case; indeed, even incarcerated prisoners can do this much. See e.g., *Bounds* v. *Smith,* 45 U.S.L.W. 4411 (April 27, 1977). But obviously use of a law library is unavailing where unpublished "orders" are concerned. The litigant faces the task of traveling from Wisconsin, or southern Illinois or Indiana, to Chicago to simply even read these "orders." The imposition on any litigant—and most particularly the indigent—is apparent. Moreover, the problem of access bears particularly heavily for the immobilized individual—confined by handicap, or more likely institutionalized in a prison or mental institution—who simply does not have the ability to travel to the repository of unpublished "orders."

Thus, while the purport of Rule 35 is to make available to any seeker unpublished "orders", in fact access is really quite problematical.

The problem of availability of "orders" is exacerbated further by the nature of litigants, and of their attorneys. Some attorneys—particularly those employed by the United States Attorney, the state Attorney General, and the Corporation Counsel of the City of Chicago, appear regularly before the Court of Appeals. Their positions provide them, over a period of time, with ready familiarity with

unpublished "orders" of the Court.[16] The litigant or attorney who only rarely appears before the Court, or who does so in successive appeals bearing no relationship to each other in terms of subject matter, is necessarily not going to have the same familiarity with the Court's unpublished "orders."

The ready answer, supposedly, to these disparities of access is invocation of the no-citation portion of Rule 35: if the unpublished "order" cannot be cited, then access to it really is irrelevant because no litigant or attorney 'needs' it anyway.

This answer fails upon analysis, however.

Knowledge of prior rulings—even unpublished ones—can definitively determine whether a litigant will undertake to appeal his case. Knowing of one, or two, or even more unpublished rulings which address the same area of law, if not similar facts, may be sufficient deterrent to expending the time and money which an appeal entails. And of course, to the extent that an institutional litigant possesses a backlog of unpublished rulings, he can more intelligently make those decisions concerning time and money. Indeed, the knowledge of past unpublished decisions can well help a litigant in even deciding whether to initially file suit or, once having so filed, in deciding how to structure the case.

Thus, from the perspective of litigants and attorneys, the existence of unpublished "orders" is not simply an irrelevancy, but is rather a very significant factor in the litiga-

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[16] See, for example, *United States* v. *Erving,* 338 F.Supp. 1011 (W.D. Wisc. 1975), wherein the United States Attorney cited to the district court an earlier unreported ruling of that court which had been subsequently affirmed by unpublished "order" of the Seventh Circuit Court of Appeals.

tion process. And to the extent that by geography or occupation, some litigants have greater access to these "orders" than do other parties, equality is defeated and justice is thereby impaired. This impairment of justice is particularly troubling when it is the Court of Appeals itself which is the agent which, by its Rule 35, generates the opportunity for the disparity of access making a difference. For after all, were all rulings published, all would have access to them, despite geographical and institutional differences.

2. The Use of Unpublished "Orders" Creates the Potential for Different Treatment of Equally Situated Litigants.

It is not inconceivable that different litigants may appear before the courts of the Seventh Circuit presenting very similar—in fact, identical—questions of law. Presumably, were there a guiding appellate court ruling, all the litigants would receive dispositions in conformity with that ruling. But where a relevant Court of Appeals decision is rendered by unpublished "order," there is no ready means to determine whether in such situations the litigants receive uniform treatment. The possibility clearly exists that they will not—different trial courts, or different panels of the appellate court, hearing like cases but unbound by published precedent, may decide the cases differently. To the extent that this differential treatment occurs—indeed, even to the extent that it may possibly occur—equality of treatment is denied.

At least one commentator has pointed to just such inquality. See e.g., Weisgall, "Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion," 9 U. of San Francisco L. Rev. 219, 253-54 (1974). Moreover, the potentiality for such inequality occurring has been raised by at least two litigants within the Seventh Circuit. In *Shear* v. *Richardson,* 364 F. Supp. 43 (S.D. Ill. 1973), the district court had before it a litigant who "(i)n his brief relies heavily upon an unpublished order of the . . . Court of Appeals for the Seventh Circuit. . . ." 364 F. Supp. at 44 n.1. The court responded by stating that "(s)uch reliance is improper" because of the no-publication, no-citation rule. *Ibid.* A similar situation existed in *Do-Right Auto Sales* v. *The United States Court of Appeals for the Seventh Circuit,* ..... U.S. ....., 97 S. Ct. 341 (1976), where the petitioner before this Court sought a writ of mandamus directed to the Court of Appeals arising out of the trial court's having stricken from the record petitioner's reference to an unpublished "order," which the petitioners described in their petition to this Court as being "a ruling 'on all fours' with" their own case. Motion for Leave to File Petition for Writs of Mandamus and Prohibition, Petition for Writs of Mandamus and Prohibition, and Arguments in Support Thereof, at 8.

If indeed the trial courts in *Shear, supra,* and *Do-Right Auto Sales* reached conclusions contrary to those of unpublished decisions 'on all fours,' there is clearly a very serious deprivation of equal treatment. Even if in fact the ultimate results in the two cases were consonant with the unpublished "orders," the potential for inequality demonstrated in the two cases remains. For, after all, few litigants are likely to in fact be aware of such "orders," and thus will not even be able to draw the trial court's attention—or for that matter the appellate court's attention—to a conflicting ruling which, were it published, clearly would control.

B. CIRCUIT RULE 35 IMPAIRS THE DECISION-MAKING PROCESS.

This Court, daily occupied with the obligation of writing opinions which must speak to the great legal issues of our society, hardly needs to be told that the opinion-writing process is a difficult one. Phrasing, explanation, the nuances of language all are critical in the setting down for permanence of the reasoned resolution of a legal dispute. That difficulty—stemming from the care which must be taken in saying exactly what is to be said in the right way, taking into due account the precedents of the past and the impact of today's decision on the future—reflects a fundamental benefit of opinion writing. It exposes the judge's judgment to an exercise whose rigor helps ensure the 'rightness' of his decision. The Court of Appeals for the Fifth Circuit has put the matter well:

> Opinions are to serve a number of purposes, at least two of which are highly significant. One is that an articulated discussion of the factors, legal, factual, or both, which lead the Court to one rather than to another result, gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to ill-considered or even arbitrary action by those having the awesome power of almost final review. The second, of course, is that the very discursive statement of these articulated reasons is the thing out of which law—and particularly judge-made law—grows. It is an essential part of the process of the creation of principles on which predictions can fairly be forecast as a basis for conduct, accountability, or the like. . . .

N.L.R.B. v. *Amalgamated Cloth. Wkrs. of America, AFL-CIO, Local 990,* 430 F.2d 966, 972 (5th Cir. 1970).

Students of the judicial process, as well as its practitioners, make the same point:

> (T)he necessity for preparing a formal opinion assures some measure of thoughtful review of the facts in a case and of the law's bearing upon them. Snap judgments and lazy preferences for armchair theorizing as against library research and time-consuming cerebral effort are somewhat minimized. The checking of holdings in cases cited, the setting down of reasons in a context of comparison with competing reasons, the answering of arguments seriously urged, the announcement of a conclusion that purportedly follows from the analysis set out in the opinion, are antidotes to casualness and carelessness in decision. They compel thought. It is even necessary that the thought have some of the quality of rigorousness in it. This does not assure that any particular opinion will be a good one, but it does increase the likelihood that it will be fairly good. That is a genuine function of judicial opinions, everyone will agree.

Leflar, "Some Observations Concerning Judicial Opinions," 61 Colum.L.Rev. 810, at 810 (1961).[17]

Rule 35 inexorably leads away from the rigor and discipline which opinion writing imposes, and thus the Rule imperils, for lack of better terminology, 'good' decision-making.

Amicus can anticipate, of course, the assertion that Rule 35 does not curtail writing but only, rather, the publishing of that which is written. Thus, the reasoning goes, the quality of decision-making is not infringed; it is merely the quality of citable opinions which is limited. The assertion fails upon analysis.

That analysis starts with the claim by the Rule's proponents that the Seventh Circuit Court of Appeals indeed does produce, even in its unpublished "orders," reasoned, instructive decisions. For example, Judge Sprecher, testi-

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[17] See also, Llewellyn, *The Common Law Tradition* (1960); Llewellyn, *The Bramble Bush* 159 (1951 ed.).

fying before the Commission on Revision of the Federal Court Appellate System, explained that the Court's "orders" are sufficiently explanatory to "tell the litigants and their counsel exactly what the reasons are for the decision . . .".[18] And his view is supported by another witness before the Commission who observed:

> The practice in the Seventh Circuit is that the order contains a good deal of detail with regard to why the case was decided as it was. It is short on the facts and the factual background, which would help make it relevant in other cases to analogize, but it is instructive as to the participants in that case who know the facts, and they do get an understanding of the thinking that went into making that decision. . . .[19]

A resume of unpublished "orders" at least superficially supports the position that the Court of Appeals is certainly doing more than merely setting down perfunctory statements. Of 65 appeals decided by unpublished "orders" between December 13, 1976 and February 11, 1977, 16 totaled 1 page each, 33 ranged between 2 and 5 pages, 14 ran 6 to 10 pages, and 2 exceeded 10 pages. Indeed, in the very case before this Court, the "order" of the Court of Appeals totals 7 pages.

If it is correct to say that the present activity of the Court by way of its preparation of unpublished "orders" is as substantive as the Commission witnesses maintain, and as the statistics as to page lengths further suggest, then it is difficult to perceive what renders them inadequate for publication. At least in terms of the use of precedent

[18] Commission Hearings, *supra* note 3, Sprecher Testimony, *supra* note 7, at 531.

[19] Commission Hearings, *supra* note 3, Testimony of Irvin B. Charne, Former President, Bar Association of the Seventh Federal Circuit, at 491.

and of the application of legal principles, the unpublished "orders" of the Seventh Circuit compare well with published "opinions."[20] Thus, the argument for non-publication fails if the contention is unblinkingly accepted that unpublished "orders" are indeed comparable in reasoning and explanation to published "opinions."

Obviously, the argument for non-publication is nonetheless made. If we are to accept the assertion made in the context of that argument that unpublished "orders" do save court time—and we add to that assertion the fact that the savings does not come in terms of length of writing—the only savings resulting must flow from time saved in decision-making, rather than in decision writing. This conclusion is even more damning for the continued existence of Rule 35, for impairment of decision-making must mean impairment of justice. This conclusion, moreover, is more than just a matter of logic. We draw it as well from the testimony of Judge Sprecher before the Commission on Revision of the Federal Court Appellate System:

> It takes about 50 per cent of a judge's time to prepare opinions and to read other judges' opinions. If a substantial portion of that time can be conserved by a judge knowing in advance that he (sic) dealing with a non-precedential case, if he can eliminate writing and researching most or all of the facts, which are

[20] See Hastings, *supra* note 5, at 371:

> Another noticeable change has been in the character of our unpublished orders. In most cases they now deal fully with the nature of the appeal, the issues presented, and the reasons and authorities for the rulings made. They have taken on the nature of an unpublished per curiam opinion.

Contra, Report of the Chicago Bar Association Committee on Appellate Court Congestion and Procedure, Chi. Bar. Rec. 16, 20 (July-Aug., 1974).

> known to the parties in any event, and if he can eliminate the difficult process of weighing the facts and applicable law which is essential to a precedent-setting case but not otherwise, he can eliminate the need also for the kind of blending of legal developments from the past to the present that are necessary to develop a precedent, and he can save a tremendous amount of this 50 percent of the case time. . . .[21]

Judge Sprecher speaks of eliminating the "difficult process of weighing the facts and the applicable law." We would suggest that that process is at the very heart of decision-making, and that the elimination of that process cannot but derogate from the 'rightness' of the decision. Legal principles in the abstract are usually clear—it is their application to the facts of a given case which is the very source of litigation, on the one hand, and judicial decision-making on the other. And, at least as we understand our system of case law in this country, it is the slow accretion of decisions applying these principles to different sets of facts—sometimes factual patterns very similar to their predecessors—which make for the continuing growth of the law and for the responsiveness of seemingly settled principles to new conditions.

Judge Frank, while writing in the context of Federal Rule of Civil Procedure 52's requirement that district courts enunciate their findings of facts and conclusions of law, cogently stated the essential nature of that judicial "weighing (of) the facts and the applicable law" which Judge Sprecher addressed:

> An impeccably "right" legal rule applied to the "wrong" facts yields a decision which is as faulty as one which results from the application of the "wrong" legal rule to the "right" facts. . . . (A)s every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that . . . the facts are thus-and-so gives way when it comes to expressing that impression on paper. . . .

United States v. *Forness,* 125 F.2d 928, 942-43 (2nd Cir. 1942), cert. denied, 316 U.S. 694 (1942). As former Arkansas Supreme Court Justice Leflar wrote: "(T)he necessity for preparing a formal opinion assures some measure of *thoughtful review of the facts in a case and the law's bearing upon them.*" Leflar, "Some Observations Concerning Judicial Opinions," *supra,* at 810 (Emphasis added).

In sum, Rule 35 does exact a heavy toll. It removes from judges that very burden of careful, rigorous consideration which 'good' decision-making demands.

C. CIRCUIT RULE 35, WHILE BARRING LITIGANTS FROM CITING UNPUBLISHED "ORDERS," LEAVES THE COURTS FREE TO UTILIZE THEM IN A SUB SILENTIO MANNER—A RESULT DETRIMENTAL TO JUST DECISION-MAKING.

On its face, Rule 35 purports to bar litigants from citing to the courts of the Seventh Circuit unpublished "orders." In amicus' view, this Rule imposes serious inequity upon the litigant, Section IIIA, *supra,* and seriously undermines the decision-making processes of the Court of Appeals, Section IIIB, *supra.* The Rule has a third pernicious consequence: it allows the courts to in fact rely upon the very "orders" whose precedential bearing the Rule disclaims. In brief, the courts can rely upon orders which litigants cannot cite, to which they cannot respond, and of which they are even likely to be unaware.

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[21] Commission Hearings, *supra* note 3, Sprecher Testimony, *supra* note 7, at 530.

United States v. *Rosciano,* 499 F.2d 173 (7th Cir. 1973), bears out this assertion, as does Judge Sprecher's testimony before the Commission on Revision of the Federal Court Appellate System, discussed *infra* in this section. In *Rosciano,* then-Judge Stevens dissented, along with Judges Swygert and Sprecher, from an en banc ruling. Seeking to make his point in the dissent, Judge Stevens apparently felt that a prior dissent of his, in an unpublished ruling, was relevant. Thus, "(i)n order to avoid what might otherwise be a violation of sub-paragraph (4) of our present Circuit Rule 28 (now superseded by Rule 35)," he published "a copy of . . . (his) dissent in the (unpublished) *Fawcett* case as an appendix to this opinion (in *Rosciano*). . . ." 499 F.2d at 176 n.4.

Obviously, whatever the knowledge of the government's attorney, or of Mr. Rosciano's, at least one judge sitting on the en banc Court knew of the instruction provided by an unpublished "order." Fortunately, that judge specifically invoked the unpublished decision, thus at least providing the litigants an opportunity to understand better the dissenters' reasoning and to cite that reasoning to this Court, were a certiorari petition to be filed.

It is hardly surprising that sitting judges know of unpublished "orders". After all, they will themselves have written them. Unless each judge's mind is a *tabula rasa* for each new case he hears, the words of his own past are hardly going to remain secreted. That is just a statement of human existence. But there is more as well, going not so much to the marvels of memory as to the working of human nature. Without faulting any judge's integrity, it is at least not beyond the pale of mention to suggest that a judge who has ruled one way in a past, unpublished "order" may feel some pressure to rule the same in a similar

case now before him. For that matter, peer pressure and the desire to maintain institutional solidity may incline him to rule today in a way which comports with a fellow judge's unpublished ruling of yesterday.[23]

The internal use—apart from internal knowledge—of unpublished rulings is borne out further by the testimony of Judge Sprecher before the Commission on Revision of the Federal Court Appellate System. The judge's colloquy with the members of the Commission suggests the possibility that unpublished "orders" could be used by the court as something which Judge Sprecher terms "non-precedential precedent(s):"[24]

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[23] We by no means suggest that this obeisance to the past is inevitable, but certainly it is possible. An interesting example of the situation is provided in *United States* v. *Joly,* 493 F.2d 672 (2nd Cir. 1974). In response to the appellant's argument, the government urged that "two prior decisions of . . . (the Court), on all fours with this one, foreclose the issue." 493 F.2d at 675. The cases cited, the Court explained, "were both affirmances from the bench by different panels of this court." 493 F.2d at 675. In light of their falling within the purview of the Second Circuit Court of Appeals' no-publication, no-citation rule, the Court rejected the government's reliance upon them. It then proceeded to reject the appellant's substantive argument.

While we would not suggest that the Second Circuit Court of Appeals in fact relied upon its earlier unpublished decisions, we would suggest that their very existence—in this instance somehow known to one of the litigants—would at the least have exerted some pressure on the Court—if not to rule similarly in *Joly,* to at least make some effort to distinguish the now-public unpublished decisions.

[24] Commission Hearings, *supra* note 3, Sprecher Testimony, *supra* note 7, at 537.

JUDGE ROBB: Judge, do you have any system of assuring yourselves that there is no conflict intra-court in your unpublished opinions?

. . .

JUDGE SPRECHER: It worries me . . . because what we are going to have to do now, I think, and this is probably the next step, we are going to have to have some kind of an intracourt index of unpublished opinions, indexed according to the subject matter and so forth. These matters are going to have to be available for the court, even though they cannot be cited by the court or to the court.

I see nothing underhanded about something like that. It just means that internally we will be consistent and that different panels of the court in unpublished orders are not coming out with different results at the same time, or even at different times.

To me, the biggest argument against the people who say citation should be allowed is to permit the court to have full availability and use of its opinions for its own intra-court procedures, but without citing them to the outside world because they are not precedential. It is just a matter of consistency so that there are no aberrations.

Further on, Judge Sprecher continued:

> I think all I am speaking about is--I am talking about a non-precedential precedent, because I am talking about aids to future production of opinions and not their use as precedents in the stare decisis sense.[25]

Obviously—as further portions of the colloquy not excerpted here emphasized—[26] there is a very fine distinction—indeed one so fine that it is virtually ephemeral—between a precedent which is a precedent, and a precedent which is usable but, because not published, is a "non-precedent."

[25] Commission Hearings, *supra* note 3, Sprecher Testimony, *supra* note 7, at 536-39.

[26] See e.g., statements of Francis R. Kirkham and Dean Roger C. Cramton, both members of the Commission on Revision of the Federal Court Appellate System, Commission Hearings, *supra* note 3, at 536-39.

Apart from the use within the Court of Appeals itself of unpublished "orders," there is the further problem—perhaps an even more severe one, of their impact upon federal trial court judges within the Circuit. Unpublished "orders" are freely available, albeit not published. It certainly is not impossible that a trial court judge will become aware—either through his own research or through other means—of "orders" relevant to a case before him. Indeed, that very awareness is explicitly established in a number of district court opinions. See e.g., *United States* v. *Erving,* 388 F. Supp. 1011, 1017 (E.D. Wisc. 1975); *United States* v. *Feinberg,* 371 F. Supp. 1205, 1214 (N.D. Ill. 1974).

In *Erving* the trial court judge specifically disclaimed reliance upon the appellate court's unpublished "order," in light of the Circuit no-publication, no-citation rule. In *Feinberg,* the trial court judge did the same, but he also engaged in considerable discussion of the unpublished "order", even though recognizing that under the Circuit Rule it had no precedential value and despite admonishing the attorney citing the case to "honor the rule." 371 F. Supp. at 1214 n.9.

Given a trial court's awareness of a prior unpublished decision by the Court of Appeals, given the press for institutional conformity, and given the institutional pressure to hand down decisions which accord—in traditional stare decisis fashion—with those of higher courts, there is clearly the danger that the trial court will indeed follow an un-

published "order", even in instances where counsel themselves are unaware of it.[27]

While one may conclude that internal use by courts of appeals and district courts of unpublished "orders" is not good, and further suggest that it is enough to simply state that conclusion emphatically, it is difficult to firmly conclude that that statement can override human nature and the pressure for institutional conformity. So long as past rulings exist—whether they are published or not—they are likely to have a force of their own on the appellate court and on the lower courts. The question is whether litigants shall be allowed to openly see and understand that force, and use those cases which the courts themselves consciously or unconsciously already are using. We think the answer to that question must be in the affirmative—and this answer means the abolition of Rule 35. Were all rulings published and citable, litigants and courts would be operating at an equal plane.

D. ON ITS FACE, AND AS APPLIED, CIRCUIT RULE 35 FAILS TO PROVIDE ADEQUATE ASSURANCE THAT SIGNIFICANT RULINGS ARE PUBLISHED.

While attempting to establish a coherent system for publication, Rule 35 does not address a number of matters seemingly relevant to the determination whether to publish or not, and thus to the correlative consequence of availability for citation.

Rule 35, for example, embodies no requirement that decisions in which appears a dissenting opinion be published,

[27] See Report of the Chicago Bar Association Committee on Appellate Court Congestion and Procedure, Chi. Bar Rec. 16, 20 (July-Aug., 1974).

notwithstanding that seemingly the existence of a dissent would suggest that the ruling is not so straightforward as a determination not to publish would suggest.[28] Indeed—and without commenting on their substance, amicus would note that the Seventh Circuit Court of Appeals has issued a number of unpublished "orders" in which a member of the panel has dissented.[29]

Rule 35 further embodies no requirement that reversals be published, except insofar as such reversals fall within the terms of its 1976 amendment.[30] Nor is there any requirement that rulings following from unpublished lower court decisions be published. The consequence of this latter silence on the part of Rule 35 is that in this petition before this Court, the public apparently has virtually no way of knowing what it is that the Court will be addressing save

[28] Rule 35 recognizes the right of a single judge to make his opinion available for publication, but "it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish." §(d)(2). The Chicago Bar Association Committee on Federal Civil Procedure urges that "where a judge writes a dissenting opinion, the majority should be required to publish its opinion along with the dissent." Commission Hearings, *supra* note 3, at 615.

[29] See e.g., *United States* v. *Dema*, No. 75-1894 (Oct. 7, 1976) (Markey, J., dissenting); *Doyle* v. *Unicare Health Facilities*, No. 75-1530 (Sept. 14, 1976) (Fairchild, J., dissenting); *United States Steel Corp.* v. *Environmental Protection Agency*, No. 76-1715 (Sept. 10, 1976) (Pell, J., dissenting). These three cases are drawn from amicus' review of unpublished decisions handed down by the Seventh Circuit Court of Appeals between December 13, 1976 and February 11, 1977. For a particularly long dissent in an unpublished "order," see *Impeach Nixon Committee* v. *Buck*, 498 F.2d 37 (7th Cir. 1974), discussed *infra* in this section.

[30] See note 4, *supra*.

from the questions certified, since the trial court opinion is unpublished, and so too is the Court of Appeals' "order."

Rule 35 also makes no distinction between perfunctory rulings, and those which—at least in terms of length—suggest the significance of "opinions."[31] The consequence of this lack is that a number of unpublished "orders" run to a considerable number of pages.[32]

Above and beyond these individual gaps in Rule 35, there is the even larger problem inherent in any censoring system which seeks to censor on the basis of prediction. Rule 35's standards for publication contemplate that only certain rulings will be published: those, for example, which "(e)stablish a new or change an existing rule of law;" which "(i)nvolve an issue of continuing public interest;" which "(c)riticize or question law;" or which "(c)onstitute a significant and non-duplicative contribution to legal

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[31] Of course, even a very perfunctory statement by the Court may have significant consequences. For example, in 1974 the Court of Appeals issued a long opinion in *Brubaker* v. *Board of Education*, 502 F.2d 973 (7th Cir. 1974), cert. denied, 421 U.S. 965 (1975). Subsequently, the en banc Court reheard the case. It split 4-4, the consequence being that it deemed the original panel ruling functus officio. The en banc Court did not publish an order so stating, however. Subsequently, a law review article running 28 pages was written with *Brubaker* as its primary focus, the author being unaware that the panel ruling had been rendered functus officio. "Brubaker v. Board of Education: Teach Dismissals for Use of Objectionable Material in the Classroom," 7 Conn. L. Rev. 580 (1975). Only thereafter did the Court issue as a published "opinion" the conclusion of the en banc Court, at 527 F.2d 611 (7th Cir. 1975).

[32] See text following note 19, *supra*.

literature (A) by a historical review of law; (B) by describing legislative history; or (C) by resolving or creating a conflict in the law; . . ." Rule 35, §(c).

Despite the effort to establish a coherent set of guidelines, by the very nature of things prediction must at times err. What seems today to be neither "new" nor a "change" in existing law may well, in hindsight, appear to be the contrary. Indeed, on a number of occasions the Court has subsequently published opinions which initially were issued as "orders," clear indication of a changed perception of the significance of the decision in retrospect. See e.g., *United States* v. *Balanow*, 528 F.2d 923 (7th Cir. 1975); *Johnson* v. *Holley*, 528 F.2d 116 (7th Cir. 1975); *Encyclopedia Britannica, Inc.* v. *F.T.C.*, 517 F.2d 1013 (7th Cir. 1973); *Brennan* v. *Local 441*, 486 F.2d 6, 7 (7th Cir. 1973).

Perhaps the most dramatic example of the failure of the predictive guidelines of Rule 35 to adequately forecast the importance of a decision is provided by the checkered history of what has now been published at 498 F.2d 37—a 1974 Seventh Circuit Court of Appeals ruling captioned *Impeach Nixon Committee* v. *Buck*. By unpublished memorandum opinion, the federal district court had denied an injunction ordering the public mass transit agency in Chicago to sell to a citizens group space on its vehicles for the presentation of a public message. The agency already in fact sold space to political candidates and to other disseminators of public messages.

The Court of Appeals reversed—in an unpublished "order" consisting of a two-page majority ruling, and accompanied by a 17-page dissent by Judge Pell. Subsequently, this Court on May 13, 1974 issued a stay of the appellate court order. Later still, the full Court—some six months after the Seventh Circuit ruling, granted certiorari, re-

versed, and remanded for reconsideration in light of *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974), and to ascertain whether the case was moot in light of President Nixon's resignation. *Buck* v. *Impeach Nixon Committee,* 419 U.S. 891 (1974). The Court of Appeals then—again by unpublished "order"—remanded, directing dismissal of the case on grounds of mootness. *Impeach Nixon Commitee* v. *Buck,* 506 F.2d 1405 (7th Cir. 1974) (table). Only after all this had occurred did the Court of Appeals reverse its 'housekeeping' determination and issue its months-old initial ruling as a publishable "opinion."[33]

It is difficult to understand how a case which brought forth a stay and then a reversal by this Court, as well as a 17-page dissent by a member of the appellate court panel itself, could be deemed unworthy of publication. Apart from the significance of the technical legal issues, the case's significance was enhanced by the very political controversy involved—e.g., the impeachment of the president. And apart from that controversy, the issue of the use of the public buses and trains in Chicago as public fora certainly seems one of concern and interest to the public.

Another example of changed perceptions in retrospect is provided by *Bach* v. *Bensinger,* 504 F.2d 1100 (7th Cir. 1974). That decision made new law in the Seventh Circuit, the Court of Appeals holding for the first time that a prisoner is entitled to be present during the opening of legal mail addressed to him in prison. Notwithstanding the assumed insignificance of the decision—given that it was issued in an unpublished "order", the Illinois Attorney General sought review in this Court. After certiorari was

[33] Commission Hearings, *supra* note 3, Lassers Testimony, *supra* note 3, at 556.

denied, 418 U.S. 910 (1974), plaintiff's counsel requested the Court of Appeals to re-issue its "order" as an "opinion," and that was done.

Several more examples emphasize the problem of prediction. The testimony of the vice-chairman of the Chicago Bar Association's Committee on Federal Civil Procedure before the Commission on Revision of the Federal Court Appellate Court System discusses one instance—*Brainert* v. *Beal;* No. 73-1382:

> (I)t is probably one of the most insignificant decisions as far as the court is concerned.
>
> However . . . (a member of our committee) felt that it had great significance due to the fact the court in this case held that a docket entry by a district court could not be disputed by affidavits, even of the clerk himself.
>
> The court in this decision cited a Tenth Circuit decision as authority for their holding. It would seem without any research that this was probably a case of first impression in this circuit, and if an attorney in the future should have a situation as such, he is not going to be able to find this case. Furthermore, he is not going to be able to cite this case as authority. . . .[34]

The same witness addressed *Ward* v. *United States,* No. 72-1215 (June 12, 1973), listed in the table of unpublished orders at 478 F.2d 1405 (7th Cir. 1973). In that decision, the Court noted, to quote the report submitted by the witness:

> that a decision by the Court of Appeals for the Eighth Circuit appeared to be contrary to the holding in this case, and so this court said that it must disagree with the Eighth Circuit's interpretation of a controlling

[34] Commission Hearings, *supra* note 3, at 608, Testimony of Maurice P. Raizes.

> Supreme Court decision relating to self-incrimination. . . .[35]

Similarly, another witness before the Commission on Revision of the Federal Court Appellate System reported another unpublished "order," *Federoff* v. *Parsons,* No. 74-1089, describing it as a "case (which) raised important issues of *res judicata* in a case involving claims against the reinsurer of an insolvent insurance company."[36]

Finally, the case now before this Court demonstrates a significant ruling issued by "order." Whatever ultimate conclusion this Court reaches as to the issues raised, it is obvious that those issues—as resolved by the Court of Appeals—are sufficiently important to warrant this Court's attention.

Significant decisions which go unreported have a number of adverse consequences. First, their absence from the reporters impairs the development of doctrine—litigants, courts of the Circuit, and other courts outside the Circuit are deprived of the reasoning and holdings of these rulings.[37] Second, the failure to report significant decisions

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[35] Commission Hearings, *supra* note 3, at 613, Report on Seventh Circuit Court of Appeals Rule 28, CBA Committee on Federal Civil Procedure, submitted by Maurice P. Raizes.

[36] Commission Hearings, *supra* note 3, Lassers Testimony, *supra* note 3, at 556.

[37] See Weisgall, "Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion," 9 U. of San Francisco L. Rev. 219, 253-54 (1974), discussing the confusion in the law of the Ninth Circuit arising from a number of unpublished rulings being inconsistent with published opinions; "Publish or Perish: The Destiny of Appellate Opinions in California," 13 Santa Clara Lawyer 756, at 756 (1973), citing an important unreported decision of a California state court; comments of Dean Cramton, Commission Hearings, *supra* note 3, at 491, discussing a series of important unreported California state rulings; Gardner, "Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?," 61 A.B.A.J. 1224 (1975).

encourages further litigation, burdening both the courts thereby and causing litigants to undertake needless expense. To this problem the Report of the Chicago Bar Association Committee on Appellate Court Congestion and Procedure addressed itself:

> One example is a recent group of cases before the Seventh Circuit Court of Appeals involving the question whether an order dismissing class allegations in a proposed class action under Federal Rule 23 was an appealable order. The Seventh Circuit ruled (in three consolidated cases (footnote omitted)) without publishing its opinion, that such an order was not appealable. Other courts of appeals had held such orders appealable. (Footnote omitted). Further appeals were taken in the Seventh Circuit until a memorandum was published. (Footnote omitted). Subsequent appeals may not have been taken if the first order had been published. (Footnote omitted).

Chi. Bar Rec. 16, 21 (July-Aug., 1974). Third, unreported significant decisions—or for that matter seemingly insignificant ones—may have the result of producing unequal treatment among litigants. See Section IIIA, *supra.*

We concur in the observations of Mr. Justice Stevens, addressing the Illinois State Bar Association's Centennial Dinner in Springfield, Illinois, on January 22, 1977:

> . . . (A) rule which authorizes any court to censor the future citation of its own opinions or orders rests on a false premise. Such a rule assumes that an author is a reliable judge of the quality and importance of his own work product. If I need authority to demonstrate the invalidity of that assumption, I refer you to a citizen of Illinois who gave a brief talk in Gettysburg, Pennsylvania that he did not expect to be long remembered. Judges are the last persons who should be authorized to determine which of their decisions should be long remembered.

There is seemingly only one response to Mr. Justice Stevens, and to the apparent mistakes made in determining —at least initially—not to publish rulings such as *Impeach Nixon Committee* v. *Buck, supra.* That is reliance upon the ability of "(a)ny person . . . (to) request by motion that a decision by unpublished order be issued as a published opinion." Rule 35, §(d)(3). Yet reliance upon this ostensible option is hardly satisfactory.

If the litigants in a given appeal are themselves content to leave it unpublished, there may well be slim likelihood that anyone else who might be interested in its publication will even be aware of the decision. Even if the litigant—or some other knowledgeable party—moves for publication, he still carries the burden of convincing the Court of Appeals by his motion that indeed the decision is "consistent with the (very) guidelines for disposition of appeals as set forth in . . . (the) rule" which the Court has already once determined do not in fact warrant publication. Rule 35, §(d)(3). Finally, a third flaw in reliance upon Section (d)(3) of Rule 35 lies in the dubious ability of a losing movant to successfully secure review of his motion's denial here. A pragmatic assessment leads to the conclusion that this Court is unlikely to undertake to start considering such denials by the Court of Appeals, given its already overburdened state and given further the standards of Rule 19 of this Court.

E. CIRCUIT RULE 35 IMPAIRS THE ABILITY OF LITIGANTS TO SECURE EFFECTIVE CONSIDERATION IN THIS COURT.

Amicus need hardly inform this Court of the increasing number of petitions and appeals filed herein. And amicus cannot from first-hand knowledge tell this Court how it functions when it renders decisions concerning granting

certiorari petitions and noting probable jurisdiction. Nonetheless, in amicus' view Circuit Rule 35 impairs the ability of litigants to obtain as full a review as they might otherwise secure.

One aspect of this impairment flows from inter-Circuit conflicts being obscured by unpublished "orders." Rule 19 of this Court sets down as one basis for considering the grant of certiorari petitions conflicts between Circuit rulings. Yet, by virtue of Rule 35, an "order" conflicting with a published decision of some other circuit is very unlikely to be known to the litigant in that circuit. Thus, the problem of conflict remains hidden.

Amicus recognizes that since "orders" are not precedential, 'true' conflict may not exist. Pragmatically, however, the conflict is there. And because "orders" are so meaningful, notwithstanding their non-citability, see Sections IIIA-D, *supra,* and IIIF, *infra,* that conflict is meaningful.

Moreover, the very fact that the rule is invoked by the Court of Appeals so as to bar publication of a decision is a signal that the case—at least in the view of the appellate court—is not important. We would suggest that this signal does not go unnoticed in this Court, even admitting that the signal may at most register subliminally.

Finally, the very cursory nature of unpublished "orders" has negative consequences. As Judge Sprecher explained in his testimony before the Commission on Revision of the Federal Court Appellate System, by the use of "orders" the Court can "eliminate writing and researching most or all of the facts."[38] Yet it may be that

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[38] Commission Hearings, *supra* note 3, Sprecher Testimony, *supra* note 7, at 530.

very treatment of the facts which is critical to an adequate assessment by this Court of the lower court decision's accuracy. This is particularly borne out by *Will* v. *United States,* 389 U.S. 90 (1967), involving a federal district court judge's order regarding the furnishing by the government in a criminal case of certain information to the defendant.

After Judge Will indicated his intention to dismiss the indictment because of the government's refusal to comply with his order, the Seventh Circuit Court of Appeals issued, without any opinion, a writ of mandamus directing him to vacate his order. This Court vacated the Seventh Circuit writ. In so doing, the Court, while in part directed by its reluctance to acquiesce in the drastic remedy of mandamus, was apparently most confounded by failure of the appellate court to justify issuance of the writ. The Court found a "failure of the Court of Appeals to attempt to supply any reasoned justification of its action," 389 U.S. at 104, and went on to state:

> (W)ithout an opinion from the Court of Appeals we do not know what role, if any, this factor (of an appellate court's familiarity with the practice of the district courts within the circuit) played in the decision below. In fact, we are in the dark with respect to the position of the Court of Appeals on all the issues crucial to an informed exercise of our power of review. We do not know: (1) what the Court of Appeals found petitioner to have done; (2) what is objected to in petitioner's course of conduct—. . . . We cannot properly identify the questions for decision in the case before us without illumination of this unclear record by the measured and exposed reflection of the Court of Appeals. 389 U.S. at 105-107.

What makes *Will* particularly apposite to cases decided by unpublished "orders" is that these cases—according

to the description offered by Judge Sprecher—are particularly sparse in terms of addressing of the factual matrix. It is exactly that missing factual analysis which the *Will* Court found so disabling in terms of allowing effective review of the appellate court ruling. That same missing analysis must mitigate against effective appreciation here of decisions handed down in unpublished "orders."

F. CIRCUIT RULE 35 AT THE LEAST PRODUCES AN APPEARANCE OF INJUSTICE.

Overriding the individual pernicious consequences which flow from Rule 35, there is the further injury done to the appearance of justice by the Rule. It may be that the Rule does not impair the quality of decision-making—assuming there were some quantifiable means to measure "quality." It may be that in fact the courts of the Seventh Circuit are very careful about blanking out from their minds unpublished "orders". It may be that this Court is able to adequately appraise the significance of "orders" coming before it by way of petitions for writs of certiorari. But even were all these 'maybe's' so, that would not detract from the appearance of secrecy which remains.

Secrecy in government is a commonplace shibboleth of the times. We do not suggest that this Court should cater to passing public fancies. But we do urge this Court to recognize that the public courts of the land—at least those in the Seventh Circuit—operate under a system which bars the public business of the courts from effective public view, and which bars litigants from use of what they may deem to be important rulings. As Mr. Justice Frankfurter wrote for the Court in *Offutt* v. *United States,* 348 U.S. 11, 14 (1954): "(J)ustice must satisfy the appearance of justice." Not only must the courts know that what they are doing is fair; the public must share that perception. "(T)he pub-

lic must be satisfied that fairness dominates the administration of justice." *Adams* v. *United States ex rel. McCann,* 317 U.S. 269, 279 (1942).

We do not think the appearance of justice is served by Rule 35.

G. BECAUSE OF ITS DEFECTS, CIRCUIT RULE 35 MAY BE STRUCK DOWN BY THIS COURT ON NON-CONSTITUTIONAL GROUNDS

The Court of Appeals' power to issue Rule 35 derives from the statute empowering all courts to "prescribe rules for the conduct of their business," 28 U.S.C. §2071, and the parallel authorization of Circuit rulemaking in the Federal Rules of Appellate Procedure, Rule 47.[39]

Possession of power does not warrant its abuse, nor action exceeding it. Rather, the rulemaking power is limited by a spectrum of weighty constraints, ranging from prudential limits to constitutional limitations. We will discuss the constitutional flaws of Rule 35 in Section IV, *infra.* Here we are concerned with limits to rulemaking power short of invocation of the Constitution.

This Court, by virtue of its ultimate supervisory authority over the lower federal courts, has the authority to negate rules—such as Circuit Rule 35—which exceed the authority of the court promulgating them, or which under-

[39] There also exists an inherent power "necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link* v. *Wabash R. Co.,* 370 U.S. 626, 630-31 (1962). This inherent power is subject to the same sorts of limitations constraining the courts' statutory and Rule 47 powers. See e.g., *Link, supra,* at 629-31; *Pan American World Airways, Inc.* v. *U.S. District Court,* 523 F.2d 1073, 1077 n.3, 1078 (9th Cir. 1975).

mine the administration of justice. See e.g., *Communist Party* v. *Subversive Activities Control Board,* 351 U.S. 115, 124 (1956); *McNabb* v. *United States,* 318 U.S. 332, 340 (1942). Cf. *Rodgers* v. *United States Steel Corp.,* 508 F. 2d 152, 163 (3rd Cir. 1975), cert. denied, 423 U.S. 832 (1975); *Sanders* v. *Russell,* 401 F.2d 241, 244 (5th Cir. 1968). Rule 35 is simply too ambitious an exercise of local rulemaking power, even if a no-publication, no-citation rule might properly be incorporated in the Federal Rules of Procedure. In *Miner* v. *Atlass,* 363 U.S. 641, 650 (1960), by way of example, this Court struck down a local rule permitting depositions in admiralty cases, perceiving this rule as instituting an example of what the Court described as "basic procedural innovations." Circuit Rule 35, rejecting a long tradition in this country of publishing appellate court opinions and honoring their citation by litigants, is just such an innovation.[40]

[40] In *Colgrove* v. *Battin,* 413 U.S. 149, 163 n.23 (1973), the Court held that a local rule's requirement of a six-member jury was not a "basic procedural innovation" under *Miner* because it did not "bear upon the ultimate outcome of the litigation." In contrast, as suggested by our arguments *supra,* Rule 35 may be at least as outcome-determinative as the discovery depositions involved in *Miner.* It may prevent a court from learning of and thus from following precedent "on all fours"; it may give institutional litigants an outcome-determinative advantage over other litigants; and it may encourage outcome-determinative shortcuts in the court of appeals' legal and factual analysis. It cannot be said of no-publication rules, as this Court said of six-member jury rules, that they "plainly" do not bear on the ultimate outcome of the litigation. In *Colgrove* the Court also noted an alternative, primary ground of decision in *Miner,* and declined to consider a suggestion that *Miner* "should be read to hold that all 'basic procedural innovations' are beyond local rulemaking power and are exclusively matters for general rulemaking." *Id.* We urge no such expansive reading of *Miner,* but only that Seventh Circuit Rule 35 is too jurisprudentially and constitutionally sensitive for the local rulemaking process.

A second basis for the striking down of Rule 35 on non-constitutional grounds exists. The Rule undermines the administration of justice.[41] It produces a number of adverse consequences, all detrimental to the operation of the federal court system. The supervisory authority of this Court, operating solely within the federal judiciary and relatively free of restraints of comity and federalism, applies here and indeed is uniquely suited to the task of "confining the (lower) court to the proper sphere of its lawful power." *Rodgers* v. *United States Steel Corp., supra,* at 162.

Apart from the matter of Circuit Rule 35's being in excess of the Court of Appeals' rulemaking power and its undermining the administration of justice, there is the further defect following from the Rule's inconsistency with Rule 19 of this Court. 28 U.S.C. § 2071 requires that local court

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[41] See e.g., *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, 124-5 (1956) ("fastidious regard for the honor of the adminstration of justice"); *Bartone* v. *United States*, 375 U.S. 52, 54 (1963); *Elkins* v. *United States*, 364 U.S. 206, 216 (1960); *Marshall* v. *United States*, 360 U.S. 310, 313 (1959); *Cicenia* v. *LaGay*, 357 U.S. 504, 508-09 (1958); *Gay* v. *United States*, 411 U.S. 974, 36 L.Ed.2d 697, 698 (1973) (Douglas, J., dissenting) (four-Justice dissent from denial of certiorari). Although the supervisory power does not appear to have been the controlling factor in any recent decisions, it has been recently affirmed, both explicitly, *Stone* v. *Powell*, 428 U.S. 465, 481 n.16 (1976), and implicitly, *United States* v. *Janis*, 428 U.S. 433, 445 (1976); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 451 (1971).

While it has generally been invoked in criminal cases, the Court's supervisory power was extended in *Communist Party, supra,* to administrative proceedings subject to federal appellate review by statute. In *Sanders* v. *Russell*, 401 F.2d 241 (5th Cir. 1968), the Court of Appeals invoked its supervisory power over district courts to invalidate the application of a local rule in a civil matter. See also, *Farmer* v. *Arabian Oil Co.*, 285 F.2d 720, 722-23 (2nd Cir. 1960).

rules be consistent with "rules of practice and procedure prescribed by the Supreme Court." A local rule which is inconsistent with the policy of a higher court's rule, or a general rule applicable to all federal courts, must fall. See e.g., *Rodgers* v. *United States Steel Corp., supra,* at 163.

Here, Rule 35 camouflages inter-Circuit conflicts. For example, as quoted earlier in Section IIID, the Report of the Chicago Bar Association Committee on Appellate Court Congestion and Procedure noted that the Court of Appeals for the Seventh Circuit issued an unpublished "order" holding that trial court orders dismissing class action allegations are not appealable, and that this conflicted with the holdings of other Courts of Appeals. Chi. Bar Rec. 16, 21 (July-Aug., 1974) While the litigants in the Seventh Circuit might have been able to learn of the conflict, given the published rulings of the other Circuits, a litigant in one of the other Circuits would not have been able to do so, given the fact that the Seventh Circuit Court of Appeals' contradictory ruling was unpublished and therefore almost certainly unknowable by a litigant hundreds of miles away, in another Circuit. Such a situation cuts against Rule 19 of this Court, which lists inter-Circuit conflict among the reasons considered in granting petitions for writs of certiorari.

IV.

CIRCUIT RULE 35 VIOLATES THE FIRST AMENDMENT.

Wholly apart from the narrower, non-constitutional defects of Rule 35, the Rule also raises particularly troubling concerns in light of the press of the First Amendment. The Rule trenches severely on the ability of litigants, attorneys and the public to acquire information about the performance of its judiciary in general, and about the judiciary's

resolution of specific disputes in the particular. It further imposes a barrier to communication by undermining the ability to usefully disseminate this information, even if it is somehow acquired. And the Rule compounds its vices by vagueness.

A. THE ACTIVITIES OF THE FEDERAL COURTS ARE INHERENTLY SUBJECT TO PUBLIC SCRUTINY.

Ours is a society committed to open government. That commitment does not falter when it is the courts which are exposed to scrutiny, as opposed to the other branches of government. Thus, this Court has written:

> A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. *Those who see and hear what transpired can report it with impunity.* There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Craig v. *Harney,* 331 U.S. 367, 374 (1947), with emphasis added by the Court, quoting verbatim in *Cox Broadcasting Corporation* v. *Cohn,* 420 U.S. 469, 492-93 (1975).

Litigants come into the courts of the land—both trial courts and those on the appellate level—not seeking any private advice, but with the full force of the historic tradition that our courtrooms are—indeed must be to preserve justice—open and public. The briefs which attorneys file are, with rare exceptions, matters of public record. Argu-

ments before the courts are open to any who may wish to enter the courtroom—again with very rare exceptions.

Thus, at least so far as those who provide the grist for decision-making are concerned, they have entered into no pact with the Court of Appeals to quell speech. Yet Rule 35 indeed does restrict speech, by denying publishability to a large number of decisions, and by further denying citation of those unreported rulings. The Court has muted its own voice, and even more, muted that of those who hear the Court's voice and want to echo it back to the courts. In so doing, the Court disserves the very public function it serves. As former Arkansas Supreme Court Justice Leflar has written:

> Judicial opinions are the voices of our courts, and they serve the purposes that the courts serve. Stated most broadly, those are the purposes of government itself, though not all the purposes of government. Opinions are the public voice of appellate courts, and so represent the judiciary to the public, but they are not voices merely. They are what courts do, not just what they say. They are the substance of judicial action, not just news releases about what courts have done, though they have that function too.

Leflar, "Some Observations Concerning Judicial Opinions," 61 Colum. L. Rev. 810, 819 (1961).

B. CIRCUIT RULE 35 TRENCHES UPON THE FIRST AMENDMENT BY INFRINGING THE RIGHT TO KNOW IMPLICIT WITHIN THE FIRST AMENDMENT.

Only last Term this Court confirmed that there is, within the coverage of freedom of expression, the right to receive information. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976). In so doing, the Court was addressing the right of consum-

ers to obtain information regarding the pricing of prescription drugs, a right impaired by a state law banning advertisements providing such information.

Certainly no one would contend that the rulings of federal courts of appeals are tantamount to commercial advertising. The absurdity of the comparison, however, only highlights the constitutional anomaly whereby the First Amendment protects the right of the consumer to secure information about the price of medicines—and thence to disseminate that information to whom he will—while, unless the Court rejects Rule 35, that Amendment excludes from its ambit the decisions of the second highest federal court of the land.

Granted, there are two distinctions between the Virginia statute and Rule 35 which go beyond the specifics of the information at issue. For one, Circuit Rule 35 does not totally bar disclosure of the information. Rather, it precludes formal publication, and thence dissemination of that information, in the courtroom only. And second, the Court of Appeals, unlike presumably pharmacists in Virginia (although the pharmacists in fact were not even parties in *Virginia State Board of Pharmacy*), is not a totally willing speaker.

These distinctions, however, do not make a difference. Concededly, Circuit Rule 35 does not preclude any member of the public from obtaining a copy of an unpublished "order." Nor does it bar the media from reporting on that "order." Pragmatically, the Rule goes far towards achieving these ends, however. Since the Court bars its own publication of "orders," as well as publication by the Federal Reporters, the public and litigants must rely upon fortuitously learning of these rulings. In most instances,

that means the public and litigants will remain ignorant of them. Moreover, because the "orders" are available only from the Clerk of the Seventh Circuit, located in Chicago, persons residing elsewhere or people who are immobilized are even more at a disadvantage both in terms of learning of "orders" and of obtaining them.

We recognize that, despite all, the "orders" are in theory available. But because they are available in indirect ways does not satisfy the First Amendment, as this Court set out in *Virginia State Board of Pharmacy, supra*, at 757 n.15:

> The dissent contends that there is no such right to receive the information that another seeks to disseminate, at least not when the person objecting could obtain the information in another way, and could himself disseminate it. Our prior decisions, . . . are said to have been limited to situations in which the information sought to be received "would not be otherwise available;" emphasis is also placed on the appellees' great need for the information, which need, assertedly, should cause them to take advantage of the alternative of digging it up themselves. We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated. . . . As for the recipient's great need for the information sought to be disseminated, if it distinguishes our prior cases at all, it makes the appellee's First Amendment claim a stronger rather than a weaker one.

See also, *Linmark Associates, Inc.* v. *Township of Willingboro,* 45 U.S.L.W. 4441, at 4443 (May 2, 1977).

Apart from the question of accessibility to the information sparingly disseminated by the Court, there is the even more damning ban on the use of the information once

secured. The right to receive information becomes a hollow thing if the recipient is barred from using the information. Granted, the recipient can tell his fellows about an "order" he has obtained; granted, also, the press can report on it. But it is sophistry to suggest that this really responds to the problem. The major value of the information lies in its use in the forum from which it emanated—the courtroom. And that forum is closed by Rule 35. In effect, Rule 35 says to the litigant and the lawyer: "You may, if you are able, hear what we have said, but you may not tell us that we have said it." That certainly rings a different note than did this Court in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 495 (1975):

> [T]he First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in public records open to public inspection.

What was said by this Court in the context of a copyright dispute applies equally here:

> The whole work done by the judges constitutes the authentic exposition and interpretation of law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute.

Banks v. *Manchester,* 128 U.S. 244, 253 (1888). See also, *Garfield* v. *Palmieri,* 193 F. Supp. 137 (S.D.N.Y. 1961), aff'd 297 F.2d 526 (2nd Cir. 1962), cert. denied 369 U.S. 871 (1962); *Lowenschuss* v. *West Publishing Co.,* 542 F.2d 180, 185 (3rd Cir. 1976).

The other distinction on the basis of which it might be contended that Rule 35 differs from the advertising ban in *Virginia State Board of Pharmacy, supra,* focuses on the speaker's perspective, rather than the listener's. In *Virginia State Board of Pharmacy,* the Court reasoned:

> "Freedom of speech presupposes a willing speaker . . . (W)here a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both." 425 U.S. at 756.

Arguably, the Court of Appeals is an unwilling speaker, given Rule 35. But, obviously, that takes the matter too far. Reluctance does not equate with refusal. And here, while perhaps reluctant, the Court clearly speaks publicly: its unpublished "orders" are secret by circumstance, not by mandate of the Rule. The lucky litigant, or the enterprising newsperson, can find—and broadcast—an "order", although again only outside the courtroom.

The distinctions between *Virginia State Board of Pharmacy* and this case failing, the invidious disparity remains: while the consumer in Virginia has a right to receive information and to use it, the lawyer and the litigant in the Seventh Circuit do not. The squaring of this situation with the First Amendment just is not feasible. Again as this Court said in *Cox Broadcasting Corp.* v. *Cohn, supra,* at 495, quoting from *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572 (1942):

> The publication of truthful information available on the public record contains none of the indicia of those limited categories of expression, such as "fighting" words, which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Only two responses remain available to the proponent of Rule 35 in the face of the First Amendment. The first is that the information suppressed is unnecessary, at any rate, since even were the litigant to obtain it, he could not use it in the courtroom. The circularity of such an argument is self-evident—the information is not needed

only because the very Rule at issue renders it unusable. But apart from that circularity, there is the further reply that the First Amendment simply does not compass a notion whereby speech's protection varies with its purported utility. *Virginia State Board of Pharmacy, supra,* and *Linmark Associates, Inc., supra,* reiterate the fundamental premise that the First Amendment serves to allow all speech (save that falling within specific exceptions, such as obscenity, which are totally irrelevant here) to be heard. It is for the people to decide what speech has merit, not for government to substitute its judgment instead. *Virginia State Board of Pharmacy, supra,* at 770.

Even taking the response of non-utility on its face, the fact is that unpublished decisions indeed do have very significant value to the attorney, to the litigant, and to the public. See Section IIIA-1, *supra.*

The second argument for Rule 35 invokes the burden imposed upon the Court if it is required to publish all rulings it issues in written form. In the First Amendment computation this burden simply carries insufficient weight to overcome the thrust of the Amendment. Even apart from general principles of First Amendment doctrine, there is the overwhelming fact that the burdens imposed by non-publication and non-citation, as discussed *supra* in Section III, are too heavy a price to pay in the name of administrative convenience, particularly when a fundamental right —freedom of speech—is at stake. See e.g., *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, 647 (1974); *Stanley* v. *Illinois,* 405 U.S. 645, 656 (1972).

Moreover, less restrictive alternatives are available to the Court to meet the burden of writing opinions, and these being present, they must be first applied. *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). For example, the Court could undertake to still rule in some cases by "orders," but publish only abstracts of the rulings. Thereby, anyone could become apprised of the decision and learn the essence of it.[42]

In *Virginia State Board of Pharmacy, supra,* this Court stressed the personal and societal benefits flowing from informed decision-making. 425 U.S. at 762-65. In the name of these benefits, the Court concluded that even speech hawking merchandise is protected by the First Amendment from governmental suppression. Here we address information of an even more weighty nature. If the First Amendment places a premium on commercial speech in the name of enabling the public to more wisely determine "how that (commercial) system ought to be regulated or altered," *Virginia State Board of Pharmacy, supra,* at 765, it can hardly afford less protection for the public's assessment of the justice system which its Constitution and national legislature have structured, and which its tax dollars sustain.

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[42] Such abstracts were used, for example, by the Illinois courts. See Commission Hearings, *supra* note 3, Lassers Testimony, *supra* note 3, at 557, 585. See also, speech of Mr. Justice Stevens, addressing the Illinois State Bar Association's Centennial Dinner in Springfield, Illinois, on January 22, 1977:

> (T)he Illinois appellate courts, unlike their federal counterparts, have demonstrated the validity of a distinction between not publishing an opinion and a prohibition against its citation. For the practice of publishing nothing more than an abstract has existed in Illinois for as long as I can remember. I do not suggest that the Illinois practice is perfect; for I would require a party who wanted to rely on an unpublished precedent to provide his adversary and the Court with a copy of the cited opinion. But the Illinois practice does demonstrate the validity of the distinction between non-publication and a non-citation rule.

C. CIRCUIT RULE 35 IMPOSES A BALD CENSORSHIP SCHEME ON ATTORNEYS AND LITIGANTS, AND THUS INFRINGES UPON THE FIRST AMENDMENT.

Amicus has already addressed the mythical nature of a "right to know" if the listener, once learning of information, is barred from disseminating it. See Section IVB, *supra*. But in terms of First Amendment doctrine, one need not address Rule 35 only in the context of the "right to know." For separate and apart from the matter of Rule 35's impact on this right, there is the fatal fact that Rule 35 imposes a bald scheme of censorship. It states, flatly and bluntly, that there are certain things which attorneys and litigants may not discuss in any court within the Seventh Circuit.

Unless the speech which these attorneys and litigants would utter if they could falls within some doctrinal exception, such as obscenity, the Court of Appeals' censorship scheme falls before the First Amendment. And of course the conclusion is a clear one, for indeed discussion of the public rulings of a federal court of appeals hardly fit within any category this Court has excerpted from the ambit of the Amendment.

The only conceivable justification that might be fashioned would be the argument that Rule 35 simply constitutes a regulation of speech in terms of place. This type of regulation, free of any focus on the content of the speech, has been upheld on numerous occasions by this Court. See *e.g., Cox* v. *Louisiana,* 379 U.S. 536 (1965); *Cox* v. *New Hampshire,* 312 U.S. 569 (1941). To apply these cases, regulating the use of the public forum, to the instant case, however, is to go much too far.

Effectively, Rule 35 says to the willing speaker—the attorney or litigant desirous of citing an unpublished

"order" to a court within the Seventh Circuit—that he may not speak at all. It is specious to contend that his First Amendment rights are unimpaired, since he may speak elsewhere. For the reality is that the only relevant locus for speaking is the courtroom; to suggest that the attorney may discuss a relevant decision outside these chambers is to suggest an alternative forum which is no forum. And of course, the notion of speech being suppressable in one place because other fora are available is itself an unacceptable one. See e.g., *Schneider* v. *State,* 308 U.S. 147 (1939).

Moreover, unlike time, place, and manner regulations, Rule 35 is content based. Not all speech is banned from Seventh Circuit courtrooms, but rather, only speech concerning unpublished "orders." *Cox* v. *Louisiana, supra,* therefore, and its analogues, do not really apply.

D. CIRCUIT RULE 35 IS VAGUE, AND THEREFORE FALLS BEFORE THE FIRST AMENDMENT.

Vagueness is a vice which the First Amendment does not tolerate. See e.g., *Hynes* v. *Mayor of City of Oradell,* 425 U.S. 610, 620-22 (1976). While Circuit Rule 35 on its face purports to establish a comprehensive and coherent set of guidelines for the determination of which rulings of the Court of Appeals shall be published as "opinions," the very fact that so many significant rulings have been issued as "orders," see Section IIID, *supra,* demonstrates that the guidelines are in fact vague. They have failed to adequately direct the Court. And because the Court's determination not to publish rulings—with the correlative ban on citation following therefrom—impinges on First Amendment rights, Rule 35 must fail for vagueness.

V.

EVEN IF THIS COURT SHOULD CONCLUDE THAT THE JURISPRUDENTIAL AND CONSTITUTIONAL DEFECTS OF CIRCUIT RULE 35 DO NOT COMPEL ITS ABOLITION, IT SHOULD STILL, IN LIGHT OF THESE DEFECTS, BE NARROWED BY THE EXERCISE OF THIS COURT'S SUPERVISORY AUTHORITY.

This Court has supervisory authority over the lower federal courts. Section IIIG, *supra*. Should this Court conclude that the jurisprudential defects and the constitutional flaws of Rule 35 are not so severe as to compel its total demise, it should still—in light of these defects—narrow the scope of the Rule.

There are a number of modifications which can be made so as to at least mitigate the flaws in Rule 35.[43] This Court could direct that whenever a determination is made by the Court of Appeals that an appeal does not warrant a

[43] We would note that the legal community at large has had only informal access to the Court's rule-making process. While the Court of Appeals recently, in recodifying its Rules, did solicit the views by letter of amicus (and assumedly the other local bar associations, as well), it has never conducted formal hearings allowing various positions to be publicly presented and then discussed. The "(l)ack of public debate and publication of local rules before adoption" has been cogently criticized. See e.g., Weinstein, "Reform of Federal Court Rulemaking Procedures," 76 Colum. L. Rev. 905, 952 (1976). Prior to the Court of Appeals' recent solicitation of comments by letter, the Court did—after adoption of Rule 35's predecessor—request the Bar Association of the Seventh Federal Circuit to undertake a survey of lawyers' views of the no-publication, no-citation Rule. A grand total of 42 attorneys received questionnaires; 18 responded. Of the 18, 9 felt that the Rule should be modified or abrogated (4 did not respond to the question at all). Commission Hearings, *supra* note 3, at 465-70.

published opinion expressing the Court's disposition, it first consider the option of simply adopting the opinion of the district court.[44] This approach would at least assure that the disposition of the case on appeal is a matter of public, published record. Of course, a premise to this approach is that the trial court opinion would have to be published.

Second, this Court could direct that all dispositions which reverse a lower court ruling be published—whether or not the lower court ruling itself has been published. This would expand upon the present form of the Rule, which only requires that reversals be published in the instance of lower court or administrative rulings which themselves have been published. Rule 35, § (c)(1)(v).

Third, the court could direct that all appellate court dispositions in which a dissent appears be published. While dissents are rare, this modification would at least assure that those decisions wherein the issues are difficult enough to elicit formal disagreement will see the light of publication, thereby reflecting the difficulty of the issues.

Fourth, Rule 35(d)(2) should be modified. This provision recognizes the right of a single federal judge to make available an opinion for publication, but thence in effect limits the exercise of that right by further stating that "it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish." We realize that federal judges are not necessarily timid individuals. Nonetheless, we view the potential for peer pressure—pressure which is sanctioned by section (d)(2)—to be serious enough to warrant elimination of the caveat to the right set out in the section.

[44] The Court of Appeals on occasion does take this tack. See e.g., *McDonald* v. *Board of Trustees of the University of Illinois*, 503 F.2d 105 (7th Cir. 1974).

The remaining two modifications are the most significant. This Court should direct that Rule 35 provide that any person may not only move for publication, but that publication shall follow such motion, provided the motion is neither frivolous nor made in bad faith. The movant, in other words, can be required to set out with particularity the bases for his motion, but the burden shall be on the Court to justify denial of the motion, rather than on the movant to prove that the motion should be granted.

Lastly, Rule 35 should be modified so that it will provide that even for unpublished "orders" an abstract of the "order" shall be published, to be printed in the Federal Reporter as are published "opinions." This device, employed in Illinois and applauded by Mr. Justice Stevens, for one,[45] would enable attorneys and litigants to at least learn of such "orders," and if they so choose, they could thence obtain them from the Court of Appeals by specifying those "orders" which they desired.

These abstracts would go a considerable distance towards mitigating some of the most serious evils of Rule 35. They would, for example, enable persons located outside the city of Chicago, where the Seventh Circuit Court of Appeals sits, to gain access to the "orders", since the abstracts would in effect be a published, subject-matter index to the unpublished rulings—something which now simply does not exist. Moreover, the abstracts would significantly diminish the inequality which now exists between institutional litigants who, because of their regular appearance before the Court, have familiarity with unpublished "orders," and the litigant who only sporadically, if even more than once, finds himself in the federal courts.

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[45] See note 42, *supra*.

VI.

SUMMARY

Amicus urges upon this Court the conclusion that the Seventh Circuit Court of Appeals' no-publication, no-citation rule exacts a very heavy toll. It derogates from equal justice, and it depreciates the quality of justice. Whether these vices are cast in terms of bad policy or First Amendment infringement, they lead to the same result—abolition of Circuit Rule 35. At the very least, they compel significant modification of the Rule.

CONCLUSION

For the foregoing reasons amicus curiae Chicago Council of Lawyers respectfully urges this Court to strike down Circuit Rule 35 of the Seventh Circuit Court of Appeals or, as a less satisfactory alternative, to direct the modifications suggested herein in the Rule.

Respectfully submitted,

HOWARD EGLIT
DOUGLASS CASSEL, JR.
JOHN CHRISTIE, JR.
Attorneys for Amicus Curiae,
Chicago Council of Lawyers

On the Brief:
STEVEN BARKIN